

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Treated Waste )  
Water Change Petition WW-20 of )  
 )  
EL DORADO IRRIGATION DISTRICT )

ORDER: WR 95-9

COUNTY: El Dorado

*ORDER RECONSIDERING APPROVAL OF CHANGES IN  
POINT OF DISCHARGE, PURPOSE OF USE, AND PLACE OF USE  
OF TREATED WASTE WATER SUBJECT TO TERMS AND CONDITIONS*

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BY THE BOARD:

**1.0 INTRODUCTION**

On October 5, 1994, the Division of Water Rights issued an order approving a change in point of discharge, place of use and purpose of use of treated waste water from the Deer Creek Waste Water Treatment Plant (Deer Creek WWTP or treatment plant) located in El Dorado County south of Cameron Park within Section 15, T9N, R9E, MDB&M. The Chief of the Division of Water Rights is delegated authority to act for the State Water Resources Control Board (SWRCB) under Resolution No. 93-87, paragraph 3.2.10, and this delegation has been redelegated to the Assistant Division Chief, who signed the order. Within the time allowed for filing petitions for reconsideration, the SWRCB received at least thirty separate petitions for reconsideration, including a petition submitted by Defenders of Deer Creek which was signed by a number of the individual petitioners as well as numerous other people. On December 13, 1994, in Order WR 94-7, the SWRCB granted the petitions for reconsideration.

On January 12, 1995, the SWRCB held a hearing to receive additional evidence and argument from the interested parties on five key issues before taking final action. The SWRCB has considered all of the evidence in the hearing record and has

considered the oral and written legal arguments of the parties.<sup>1</sup>  
The SWRCB finds and concludes as follows:

## 2.0 BACKGROUND

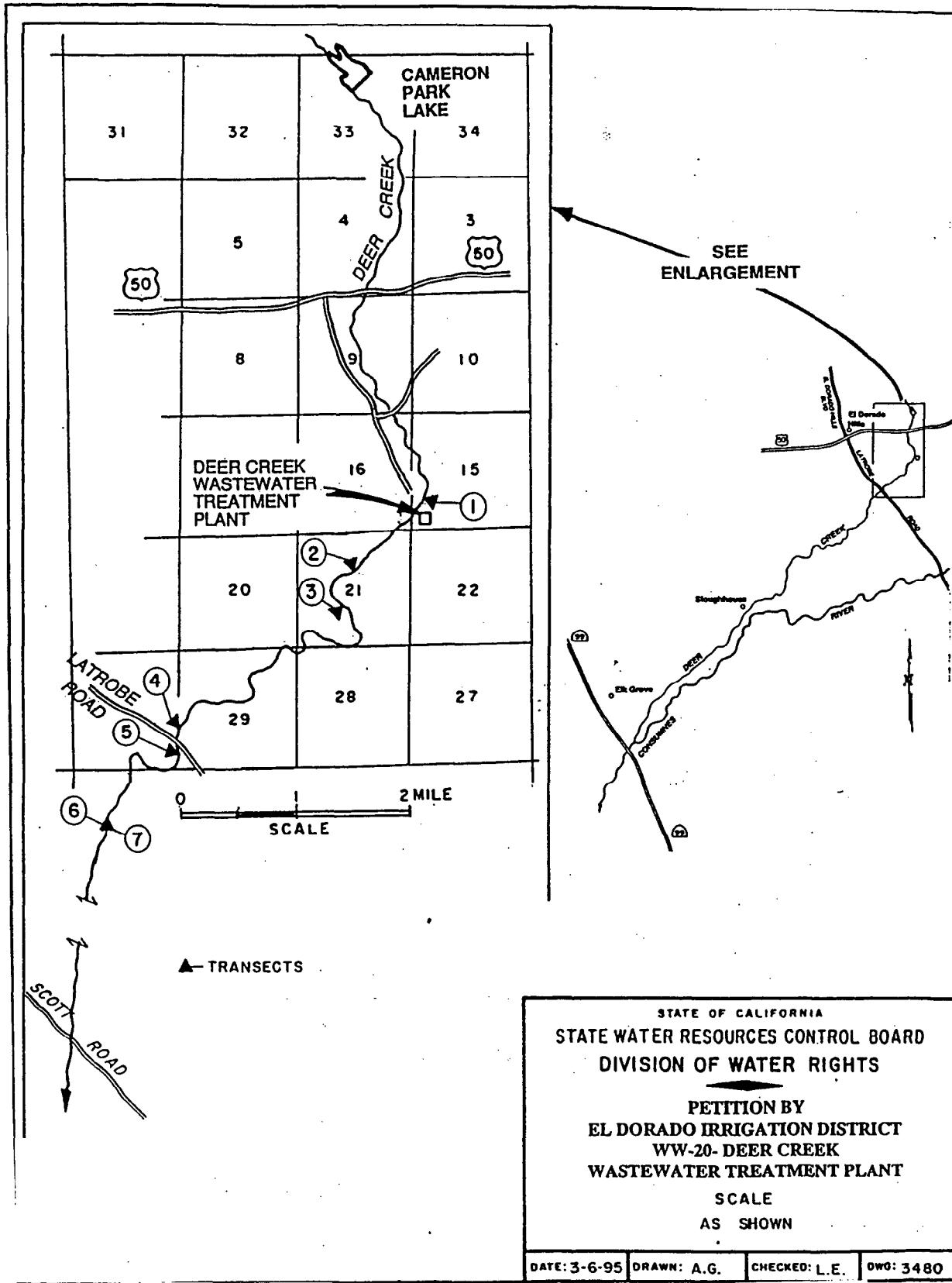
El Dorado Irrigation District (EID) operates the Deer Creek WWTP. The facility was constructed in 1974. The map in Figure 1 shows the location of the treatment plant on Deer Creek and important landmarks. On September 14, 1992, EID petitioned the SWRCB to change the point of discharge, place of use and purpose of use of the treated waste water. The Division of Water Rights sent notice of the petition to all water users located on Deer Creek below the plant who have post-1914 water rights or who had filed statements of water diversion and use under Water Code section 5100 et seq. and to all other parties who had requested notice. No protests were filed against the petition.

Under the proposed project EID has contracted to sell up to 2.5 million gallons per day (mgd) of treated waste water produced by the Deer Creek WWTP to El Dorado Hills Development Company (Development Company). The Development Company has constructed a pipeline from the Deer Creek WWTP to the place of use in El Dorado Hills. Ultimately, the treated waste water will be used to irrigate two golf courses, some wetland habitat, and landscaping for schools, parkways, and a park. The Development Company has commenced taking treated waste water and in 1994 developed and planted the first of the two proposed golf courses. The first golf course, North Uplands Golf Course, is projected to use 590 acre-feet per annum (afa), with a peak daily demand of 1 to 1.2 mgd. It will be irrigated primarily in May through October. The second golf course is anticipated in 1997, and will be built when more water is available from the Deer Creek WWTP.

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<sup>1</sup> This is the first order adopted by the SWRCB in which the SWRCB's approach to a proposed change in the point of discharge, place of use, or purpose of use of treated waste water under Water Code sections 1210 and 1211 is explained at length.

FIGURE 1



Currently the plant serves approximately 7,800 connections. The number of connections is expected to increase over time, and this will in turn increase the amount of treated waste water produced by the plant. With the current connections, the plant discharges between 1.8 mgd and 1.9 mgd of treated waste water to Deer Creek on the average during dry weather.<sup>2</sup> The discharge augments a base flow in Deer Creek above the point of discharge to Deer Creek. The base flow varies. It was measured on August 17, 1993 at 0.28 mgd. The Department of Fish and Game witness testified that the summer flow above the waste water treatment plant was approximately 0.16 mgd. The source of the base flow apparently is Cameron Park Lake and several springs upstream of the treatment plant on Deer Creek. Absent the discharge, the creek at some distance below the treatment plant would become dry during the dry weather months. The discharge has created a longer reach in which the creek continues to flow all summer. Where the creek flows, it supports riparian habitat including numerous species of plants and animals. Most of the riparian habitat has been established since the discharge commenced.

A number of homes have been established along Deer Creek; most of the petitioners for reconsideration have homes or land alongside or near Deer Creek downstream of the plant. Some of the parties divert water from the creek for landscaping use and agricultural use. One party diverts water for inside domestic use. The domestic water wells in the area have generally low yields. The creek provides some groundwater recharge.

The issues for hearing were as follows:

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<sup>2</sup> EID has a permit from the Regional Water Quality Control Board for the Central Valley Region (Order No. 86-223/NPDES) allowing the disposal of treated waste water to Deer Creek.

1. What streams, rivers, lakes, reservoirs, and underground water are the original sources of water that is treated at the Deer Creek Waste Water Treatment Plant? During each month of the year, approximately what portion of the water that reaches the plant has been stored from one season to the next?
2. Considering the sources of the water processed through the Deer Creek Waste Water Treatment Plant, who has rights to the treatment plant's effluent? Will anyone with a right to the effluent be injured by adoption of Order WW-20?
3. Was the SWRCB's adoption of Order WW-20 with the accompanying Statement of Overriding Considerations appropriate?
4. Will the change in point of discharge, purpose of use and place of use result in adverse environmental impacts? If so, what, if any, mitigation terms should be included in any order issued by the SWRCB for this project?
5. Will the change in point of discharge, purpose of use and place of use be adverse to the public safety regarding availability of water for fire protection?

### 3.0 PROCEDURAL ISSUES

#### 3.1 The Petitions for Reconsideration

The SWRCB concluded that cause had been alleged for reconsideration of Order WW-20 issued October 5, 1994, and on December 13, 1994 ordered reconsideration in Order WR 94-7.

The causes for which a petitioner may request reconsideration are set forth at Title 23, California Code of Regulations, section 768 as follows:



- 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 the evidence;
- c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- d. Error in law.

The petitions for reconsideration alleged injury to legal users of the water and impairment of senior water rights, failure to provide an opportunity for hearing, inadequate notice of the proposed change, lack of substantial evidence to support the findings, unreasonable adverse effects on existing riparian habitat and wetlands, loss of water for fire protection, and the existence of evidence that could not have been produced because the petitioners either did not receive notice of the proposed action or, in the case of a few claimants of water rights, believed there was no threat to the creek based on the notice they received. The Defenders of Deer Creek (Defenders) petition specifically alleged that the petitioners were denied a fair hearing and that Order WW-20 was not supported by substantial evidence. Most of the other petitioners joined in the petition filed by Defenders of Deer Creek.

Reconsideration is authorized by Water Code sections 1357 and 1358 if a petition is filed within 30 days after adoption by the SWRCB of a decision or order. The SWRCB is required to order or deny reconsideration on the petition within 90 days after the adoption of the decision or order. The SWRCB's regulations at Title 23, California Code of Regulations, sections 768-770 implement and interpret the Water Code sections. The regulations (1) provide that an interested person may petition the SWRCB for

reconsideration if the person alleges any of the causes listed in section 768 and (2) require that the petitioner provide the supporting materials required in section 769. The petition filed by the Defenders of Deer Creek contains allegations that support three and arguably all four causes listed above, and it fully satisfies section 769.

### 3.1.1 *Adequacy of Causes for Reconsideration*

Before granting a petition for reconsideration, the SWRCB is not required to find that the petitioners have proven that the order or decision was inappropriate or improper. Upon review of the petition, the SWRCB may dismiss or deny the petition, modify or set aside the order or decision, or "[t]ake other appropriate action." (23 Cal. Code Regs. § 770(a)(2)(C).) Other appropriate action may include providing for a hearing or submission of additional legal arguments before the SWRCB issues a final action upon reconsideration. Thus, the SWRCB may grant reconsideration in order to allow additional testimony or briefing, without making a decision on the merits of the claims raised by the petition for reconsideration until after receiving that additional testimony or briefing. The SWRCB may grant a petition for reconsideration if the petition raises issues the SWRCB concludes merit further consideration before taking final action.

With respect to the causes under subdivisions a. and c. of section 768, the alleged basis is that some persons who claim water rights from Deer Creek did not receive notice of the proposed change before Order WW-20 was issued and other persons did not receive adequate notice. Some water right claimants on Deer Creek have failed to file statements of water diversion and use under Water Code section 5101. While their failure to comply with this filing requirement explains why these water right claimants did not receive notice, section 5108 provides that these filings are merely informational, and there is no legal consequence to a person's water right of failing to file a

statement.<sup>3</sup> Without deciding whether lack of notice resulting from a claimant's failure to file statements of water diversion or use necessarily renders the proceedings unfair, it is clear that the claimants raised a substantial issue on the basis of which the SWRCB reasonably concluded that further proceedings were appropriate. To have denied reconsideration, as EID demanded, would have deprived these people of water without giving them an opportunity to prove that they have the water rights they claim.

The water right claimants who received SWRCB's September 1992 notice of EID's petition allege that the notice did not properly apprise them of the effects of the action. Written protests were due within thirty days from the date of notice. The notice stated that EID had conferred with the Department of Fish and Game (DFG), that DFG had conducted an on-site investigation, and that DFG had recommended, and EID had agreed to maintain, continued flows in Deer Creek of 0.5 mgd. Because DFG is charged with protecting fish and wildlife, the assertion that DFG had agreed to a flow of 0.5 mgd meant that DFG had determined this is an adequate flow to preserve the creek. Based on this statement, the recipients did not protest the proposed change. DFG, however, says that its staff had only an on-site meeting in 1989 with an EID representative in which there was no determination as to needed instream flows. DFG says it never agreed to an 0.5 mgd release, and points out that 0.5 mgd would not be enough water to maintain the fish and wildlife supported by Deer Creek. The Environmental Impact Report was issued in May 1994, long after the close of the period under the SWRCB's notice for protesting the project, and it disclosed that there will be significant

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<sup>3</sup> There is, however, a legal benefit of filing a statement of water diversion and use. Water right claimants who file such statements are notified whenever there is a proposed water right change that may affect their diversion and use of water. In this case, more landowners on Deer Creek would have received the SWRCB's notice of the petition if they had filed statements of water diversion and use.

adverse effects on fish and wildlife supported by Deer Creek. EID did not directly notify the water right claimants or other parties along Deer Creek of the availability of the draft EIR. EID published the notice of the draft EIR once in the local newspaper, but almost all of the petitioners for reconsideration did not in fact receive EID's notice because they do not subscribe to the local newspaper.

Because the petitioners for reconsideration were not made aware of the effects of the proposed action, they did not protest or ask for a hearing to present their evidence before Order WW-20 was issued. Therefore, the petitioners have established adequate cause for reconsideration both on the basis that they were prevented from having a fair hearing, and on the basis that there was relevant evidence that they could not produce by exercising reasonable diligence.

The petitions for reconsideration also support the "error in law" cause set forth in 23 Cal. Code of Regulations section 768(d), because legal errors were alleged and because facts supporting any of the other three causes for reconsideration would also support the existence of an error in law.

### 3.1.2 *EID's Objections to Reconsideration*

EID objected to granting reconsideration, alleging that (1) section 1357 of the Water Code authorizing reconsideration applies only to water right applications, permits and licenses and does not apply to this action, (2) the SWRCB could not even order reconsideration without proof that one of the listed causes existed, and (3) each of the causes of reconsideration was unfounded. None of EID's allegations requires the SWRCB to deny reconsideration of Order WW-20.

Regarding EID's first point, the subject of Water Code section 1357 is any decision or order. The language in section 1357

referring to persons interested in an application, permit or license, is not a limitation on the SWRCB's authority to reconsider an order. First, the statutes plainly provide that reconsideration is available. Section 1211 requires that the SWRCB review each proposed change of point of discharge, place of use or purpose of use from a waste water treatment plant under the provisions of Chapter 10, Part 2, Division 2 of the Water Code. This means that the right to treated waste water is to be reviewed by the SWRCB in the same manner as a permit or license to appropriate water. Section 1705.5, which is within Chapter 10, provides with respect to the filing of a petition for writ of mandate that "[t]he right to petition shall not be affected by the failure to seek reconsideration before the board." This section clearly contemplates that a petition for reconsideration of an action on a change petition may be filed.

Section 1357 by its terms establishes that any person with an interest in a water right that is subject to an SWRCB decision or order can petition for reconsideration. The petitioners for reconsideration clearly have an interest in the change.

Second, there are good policy reasons to interpret section 1357 as applying to Order WW-20. Order WW-20 was issued under a delegation of authority from the SWRCB. In this situation, reconsideration is an eminently reasonable approach in that it allows the SWRCB itself to review the matter. Reconsideration allows unexpected problems with an order to be resolved at the administrative level rather than in the courts. To interpret section 1357 as foreclosing this avenue to the petitioners would be poor public policy and would narrow their recourse to a petition for a writ of mandate in superior court. Such an interpretation could precipitate unnecessary litigation. The Defenders of Deer Creek argue that Order WW-20 has several inadequacies. By reconsidering, the SWRCB can correct any deficiencies. For example, this order makes additional findings

to demonstrate the support of substantial evidence. It also resolves concerns about the adequacy of notice to the petitioners. In large part the petition was unprotested because the information in the EIR was not available until after the time for protests had expired<sup>4</sup>. By ordering reconsideration and holding the January 12, 1995 hearing, the SWRCB not only has eliminated some potential litigation issues but also has refined its earlier determination.

Regarding EID's second point, proof is not necessary at the stage where the SWRCB decides whether or not to reconsider an order. By ordering reconsideration, the SWRCB merely decides to conduct further proceedings before its action becomes final. It is not necessary to hold an evidentiary hearing to decide whether to hold an evidentiary hearing.

Regarding EID's third point, the SWRCB finds that the alleged causes for reconsideration in the Defenders' petition exist, as discussed above.

EID cannot claim any legal injury as a result of the petitions for reconsideration. Within thirty days after an SWRCB order or decision is issued, any interested party can file either a petition for writ of mandate (Wat. Code § 1360) or a petition for reconsideration (Wat. Code § 1357). Thus, no SWRCB water right order or decision is beyond challenge unless more than thirty days has passed without it being challenged, either through a petition for reconsideration or through a petition for writ of mandate.

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<sup>4</sup> The lack of protests also may have been due to the interested parties having failed to ask the SWRCB to send them notice of actions proposed on Deer Creek and of water right claimants on Deer Creek having failed to file statements of diversion and use. The parties' failure to request notice or establish their claims resulted in their failure to receive notice.

### 3.2 The Standing of the Department of Fish and Game

EID objected to the SWRCB's receipt of evidence from DFG. The objection was based on the fact that DFG did not object to the draft EIR and did not file a protest to EID's petition for change. DFG timely filed its notice of intent to appear at the hearing after the SWRCB had granted the petitions for reconsideration. The hearing officer recognized DFG as an interested party and allowed DFG's participation.

Water Code section 1211 requires the SWRCB to review changes in point of discharge, place of use, or purpose of use of treated waste water pursuant to the provisions of Chapter 10, Part 2, Division 2 of the Water Code (commencing with section 1700). Under Water Code section 1703, the petitioner is required to give notice in writing to DFG of the proposed change. This section effectively gives DFG an interest in proposed changes. DFG stated in its letter dated November 4, 1994 (DFG Exhibit 5) that DFG had never received a letter from EID asking DFG to evaluate the proposal and make a recommendation. Thus, it appears that the hearing was the first instance in which DFG was a formal participant in the proposed changes.

Under the SWRCB's regulation at Title 23, California Code of Regulations, section 761(a), the SWRCB may, and routinely does, recognize persons appearing at a hearing who are not applicants, petitioners, or protestants of record. As noted above, DFG has a statutory interest in this proceeding. Further, the receipt of DFG's evidence best served the public interest since DFG provided a valuable contribution to the evidentiary record. DFG did not receive a written notification and request for evaluation of the proposed changes from EID. DFG apparently first evaluated the project during the fall of 1994. DFG's testimony was material and relevant, and it is given its full weight herein.

### 3.3 Adequacy of the Time Allowed for Hearing Preparation

The Defenders of Deer Creek requested a delay in the hearing to provide additional time to prepare their case. The SWRCB did not grant the requested delay. Although some of the petitioners for reconsideration alleged that they had not had adequate time to prepare for the hearing, the SWRCB in fact gave more than the minimum 20-day notice required for a water right hearing. (Wat. Code § 1340.) The notice for the January 12, 1995 hearing was mailed to the parties on December 21, 1994, 22 days before the hearing. Further, the SWRCB told the petitioners for reconsideration about the hearing date on December 13, 1994, when the SWRCB approved the petitions for reconsideration.<sup>5</sup> Based on the evidence provided, it appears that the petitioners for reconsideration were adequately prepared.

### 3.4 Acceptance of Exhibits in Evidence

During the hearing, the SWRCB staff offered in evidence two exhibits that inadvertently were not moved into evidence at the end of the hearing. Both exhibits were offered by reference, and both exhibits are officially noticeable. The first exhibit, Exhibit 9, is "Water Right files associated with sources of water that is delivered by EID." This exhibit contains files on the water rights of the United States Bureau of Reclamation for Sly Park Reservoir and Folsom Lake, PG&E's forebay water diversion, and EID's diversion of water from the North Fork Cosumnes River (known as Crawford Ditch). EID did not object to this exhibit. This exhibit is accepted in evidence and is officially noticed.

The second exhibit, Exhibit 10, is "All files of the SWRCB and the Regional Water Quality Control Board (RWQCB) regarding water quality approvals for the Deer Creek WWTP." This exhibit

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<sup>5</sup> The SWRCB set an early hearing date to accommodate EID's desire for a final determination before May, when the developer must start irrigating the new golf course.



contains files starting with the application to the Division of Water Quality for a permit to discharge waste to Deer Creek. EID objected to its acceptance based on relevance to the current proceeding. Exhibit 10 is hereby accepted in evidence and is officially noticed, but its use is limited to those parts which are relevant to the current proceeding. The only part of Exhibit 10 used herein is the 1972 environmental documentation for a water quality permit for the Deer Creek WWTP.

### 3.5 Precedential Value of this Order

Insofar as this order addresses the evidence received in this proceeding and contains findings of fact, this order is not to be considered as the establishment of policy or as precedent for future SWRCB orders under sections 1210 et seq. The SWRCB has engaged in a balancing of the interests in the treated waste water discharged from the Deer Creek WWTP, and has reached certain conclusions based on the hearing record. For example, the 1972 EIS for the treatment plant shows that this project originally was considered as a benefit to the creek and the ground water supply. (See page 30, below.) The findings of fact in this order and the balancing and weighing based on those facts, are unique to this case. Accordingly, the SWRCB will consider each future case on its own evidence.

## 4.0 **WATER DIVERSION RIGHTS OF PARTIES DOWNSTREAM FROM THE DEER CREEK WASTE WATER TREATMENT PLANT**

### 4.1 Construction of Water Code Section 1210 et seq., Generally

#### 4.1.1 *Right of the Treatment Plant Owner*

According to section 1210 of the Water Code, EID, as the owner of the Deer Creek WWTP, holds a superior right to the treated waste water upon meeting the qualifications set forth in section 1210. This superior right is against anyone who has supplied the discharged water (in this particular case EID not only obtains the water from the water right holder and supplies it to the water users but also operates the Deer Creek WWTP) and includes

anyone who is using the water under a service contract, unless there is an agreement to the contrary. There is no evidence of a contrary agreement. Under section 1210 this right cannot affect EID's obligations to any legal user of the waste water discharged into Deer Creek. This right also does not affect SWRCB's or the RWQCB's regulatory authority under the Porter-Cologne Act. (Wat. Code § 13000 et seq.)

Section 1211 provides for the SWRCB's approval for any change in "the point of discharge, place of use, or purpose of use" of the treated waste water. According to section 1211, the SWRCB must review the proposed change pursuant to the provisions of Chapter 10 (commencing with section 1700) of Part 2 of Division 2.

#### 4.1.2 *Rights of Legal Users of Discharged Water*

According to section 1211 of the Water Code EID, as owner of the Deer Creek WWTP, must obtain the approval of the SWRCB before it can make any changes in the point of discharge, place of use, or purpose of use of the treated waste water. The SWRCB reviews such proposed changes pursuant to the provisions of Chapter 10 (sections 1700 through 1707) of Part 2 of Division 2. Section 1702 provides that the SWRCB can grant an approval for the proposed changes if the changes will not operate to the injury of any legal user of the waste water discharged into Deer Creek. Whether or not injury will occur depends on whether the other legal users of the water have water rights sufficient to require EID, owner of the Deer Creek WWTP, to release the treated waste water for the legal users' benefit. There are both riparian and appropriative right holders who divert water from Deer Creek and who could be affected by the proposed changes.

#### 4.2 Rights to Divert the Natural Flow of Deer Creek

Deer Creek under natural conditions is an intermittent stream which originates approximately seven miles upstream of the

treatment plant. Cameron Park Lake is on Deer Creek approximately 4.5 miles upstream of the treatment plant. Perennial flow from the lake has been measured in the summer at the treatment plant at 0.16 and 0.28 mgd.

#### 4.2.1 *The Rights of Downstream Claimants*

A number of petitioners for reconsideration claim rights to the diversion and use of water from Deer Creek. The petitioners for reconsideration who claim water rights alleged that the proposed changes would injure their legal uses of water and impair existing senior water rights. As explained below, the water users on Deer Creek do not have senior water rights to the treated waste water from the Deer Creek WWTP. Consequently, they cannot compel EID to release the treated waste water to them for their out-of-stream use. Water users with valid water rights do, however, have rights to divert and use any water flowing in Deer Creek that originated in Deer Creek. The rights of downstream water right holders vary depending on the type of right and its seniority. Riparian rights are the most senior, but they attach only to the natural flow of the stream. (Bloss v. Rahilly (1940) 16 Cal.2d 70, 104 P.2d 1049.) Riparian rights do not attach to water that has been stored upstream during an earlier period. (Lindblom v. Round Valley Water Co. (1918) 178 Cal. 450, 173 P. 994, 997), nor do they attach to water that has been imported into the watershed. (E. Clemens Horst Co. v. New Blue Point Mining Co. (1918) 177 Cal. 631, 171 P. 417.) Appropriative rights attach to any water flowing in the stream, subject to any terms and conditions on the rights. (Wat. Code § 1201.) The relative seniority among appropriative rights is based on the dates of the water right applications or, in the case of pre-1914 appropriators, on the dates when the appropriations were commenced. All appropriative rights initiated since 1914 can be acquired only by obtaining a permit from the SWRCB. (See People v. Shirokow (1980) 162 Cal.Rptr. 30, 605 P.2d 859, 26 Cal.3d 301.)

#### 4.2.2 *Storage of Water Upstream*

EID has two water right licenses confirming its appropriative rights to divert water to storage in Cameron Park Lake. EID is authorized to divert water under Licenses 8176 and 8177 issued on Applications 13794 and 14426 from November 1 of each year through April 1 of the following year (season of diversion). Diversion to storage of any water reaching Cameron Park Lake outside of this season is not authorized, and any inflow to the lake outside the season of diversion should be bypassed for use downstream. Likewise, any inflow during the diversion season that exceeds the authorized appropriative right should be bypassed. If senior downstream water right holders including riparian right holders are deprived of water at any time when there is natural flow because of EID's diversions to storage upstream, they may have a basis for filing a complaint with the SWRCB or with the Superior Court.

The authorized purposes of use under EID's water right licenses include industrial, municipal, and recreational uses, but EID has reported only nonconsumptive recreational use since 1979. EID last filed reports of licensee for Cameron Park Lake in 1984.

EID witnesses testified that the land underlying Cameron Park Lake and the dam was transferred to the Cameron Park Community Services District in 1987, but EID's witnesses were not sure that EID had transferred the water rights. The Division of Water Rights sent EID a letter dated January 12, 1995 regarding the delinquency of license reports. The Division of Water Rights enclosed copies of Form WR 29a, Notice of Assignment, for EID's use in notifying the SWRCB if the rights had been transferred. EID has not filed a Notice of Assignment with the Division of Water Rights transferring the water rights.

#### 4.2.3 *Season of Water Availability*

Since Deer Creek is an intermittent stream in most of its length, water originating in Deer Creek is available in most of the creek only during wet seasons. (Bloss v. Rahilly (1940) 16 Cal.2d 70, 104 P.2d 1049.) As discussed below, holders of appropriative rights can take water from the stream even if it did not originate in the stream, but their rights are junior to the party who put the water into the stream, and they cannot force the party releasing water into the stream to continue to release it. In Deer Creek, natural flow into Cameron Park Lake stops in an average year between May 15 and June 1. Leakage from the dam at Cameron Park Lake plus flows from several springs supplies the creek downstream from the dam. The stream begins flowing again after fall rains commence. Under Water Right Order No. 89-25, water is not available for appropriation from July 1 through October 31 of each year in the Cosumnes River watershed upstream of the Mokelumne River. (Wat. Code § 1205 et seq.)

#### 4.3 The Law of Return Flows Applies to Discharges from the Waste Water Treatment Plant

##### 4.3.1 *The Application of the Law of Return Flows to Discharges of Treated Waste Water*

Return flow consists of water that has been used or appropriated that returns back to the stream it was diverted from or to some other stream or body of water. Section 1202(d) of the Water Code provides that unappropriated water includes "[w]ater which having been appropriated or used flows back into a stream, lake or other body of water." Where natural flow has been returned to its stream after use, the downstream water right holders using the return flows have been able to prevent the discharger from reclaiming the water. (Scott v. Fruit Grower's Supply Co. (1927) 202 Cal. 47, 258 P. 1095.) If the source of the water is foreign (i.e., imported from a different watershed) then the importer of foreign water has no obligation to continue releasing the water into the watercourse for downstream users and may reclaim it.

(Stevens v. Oakdale Irrigation District (1939) 13 Cal.2d 343, 90 P.2d 58.) The importer of foreign water into a watercourse can cease to abandon the return water and instead dispose of the water under a contract. (Haun v. De Vours (1950) 97 Cal.App.2d 841, 218 P.2d 996.)

Riparian right holders cannot claim foreign water that is discharged into the stream. (Stevinson Water Dist. v. Roduner (1950) 36 Cal.2d 264, 223 P.2d 209; E. Clemens Horst Co. v. New Blue Point Min. Co. (1918) 177 Cal. 631, 171 P. 417.) Riparian right holders have a right only to "the natural flow of the watercourse." (Lux v. Haggin (1884) 69 Cal. 255, 391, 4 P. 919; Bloss, supra.) Based on these authorities, the downstream water users may not compel EID to continue to release the treated waste water into Deer Creek because the water is foreign to the Deer Creek watershed and would not be found in the creek under natural conditions.

#### 4.3.2 *The Sources of Water*

Under natural conditions, the water discharged into the WWTP from EID's service area would not flow into Deer Creek and would not be available for either riparian or appropriative right holders to use.

The waste water that is delivered to the Deer Creek WWTP primarily is supplied by four sources which are located outside the drainage area of Deer Creek. Under natural conditions the water from these sources would not flow into Deer Creek. The two primary sources of water that EID uses to supply the area are the PG&E Forebay Reservoir and the Sly Park Reservoir (also known as Jenkinson Lake). Under natural conditions the water taken from the Forebay Reservoir would continue to flow down the South Fork of the American River which is tributary to the American River which is tributary to the Sacramento River. The water in the Sly Park Reservoir (Jenkinson Lake) would flow in a southwesterly

direction down Sly Park Creek. Sly Park Creek is tributary to Camp Creek which is tributary to the North Fork of the Cosumnes River which is tributary to the Cosumnes River. Although Deer Creek is also a tributary of the Cosumnes River, it joins the Cosumnes River downstream of where the water from Sly Park Creek joins the Cosumnes River.

EID also identified a secondary source of water from the North Fork Cosumnes River through the Crawford Ditch<sup>6</sup> but did not specify any quantities. This source of water, under natural conditions, would flow down the Cosumnes River and past Deer Creek. On rare occasions EID delivers water from Folsom Lake to the Deer Creek WWTP service area. Under natural conditions this water would continue to flow down the American River which is a tributary to the Sacramento River and would not flow down Deer Creek.

#### 4.3.3 *Rights of Appropriators*

When foreign water has been abandoned into a watercourse, that same water becomes subject to appropriation. (Bloss v. Rahilly (1940) 16 Cal.2d 70, 104 P.2d 1049.) However, these appropriative rights attach only to the water that has been abandoned and are always subject to the right of the importer who may cease to abandon the water at anytime. (Stevens v. Oakdale Irrigation District (1939) 13 Cal.2d 343, 90 P.2d 58.) Therefore, the downstream appropriative users of the abandoned waste water are junior right holders and such rights are subject to the superior rights of the importer (EID) of such foreign water.

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<sup>6</sup> *EID's rights under the Crawford Ditch diversion are the subject of a separate proceeding before the SWRCB. This order does not purport to make any determination regarding that diversion, except that if any water is diverted from the North Fork Cosumnes River, it would be foreign water in Deer Creek.*

The SWRCB regularly issues permits to appropriators of treated waste water or return flow that has been discharged into a natural watercourse. These permits contain standard permit term 25, which provides:

"To the extent that water available for use under this permit is return flow, imported water, or waste water, this permit shall not be construed as giving any assurance that such supply will continue."

This language makes it clear that the permit does not in itself give the permittee a right against a party discharging water upstream who may cease to discharge the water into the watercourse in the future. Generally, water that has been appropriated or used and subsequently released into a natural watercourse can be appropriated by downstream users.

#### 4.3.4 *Rights of Riparian Right Holders*

It is well established by case law in California that riparian rights do not attach to foreign water abandoned into a stream that is bordering the riparian land. In order to obtain a right to use the foreign waters, the riparian owner must appropriate that right because the right to use the surplus foreign water is appropriative in nature. (Stevinson Water District. v. Roduner (1950) 36 Cal.2d 264, 223 P.2d 209.) In order for land to be riparian it must be within the watershed of the particular stream that it borders. (Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 81 P.2d 533.) This limitation is based on the rationale "that where the water is used on such land it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is, in consequence, entitled, so to speak, to the use of its waters." (Anaheim Union Water Co. v. Fuller (1907) 150 Cal. 327, 88 P. 978.)

Therefore, the riparian right holders on Deer Creek only have a right to the natural flow of the creek and of the tributaries



that enter into the creek above the riparian right holder's land. (Crane v. Stevinson (1936) 5 Cal.2d 387, 54 P.2d 1100.) Although Deer Creek is part of the Cosumnes River watershed, the riparian right holders on Deer Creek cannot claim the water originating in other parts of the Cosumnes River watershed because that water would not flow to Deer Creek under natural conditions.

#### 4.3.5 *Rights to the Ground Water Reaching the Plant*

EID's witness testified that only 0.1% of the water that reaches the Deer Creek WWTP comes from ground water that is extracted within the drainage area of Deer Creek. Return flow of ground water should be treated as foreign water if the ground water does not naturally flow into the watercourse and is only present because it has been extracted from the ground. In this particular situation it is unclear whether the ground water under natural conditions would flow into Deer Creek and be available for downstream users. However, the amount of treated waste water attributable to ground water that is currently being discharged to Deer Creek is less than the minimum amount of waste water that will be required to be discharged to Deer Creek pursuant to this order.

## 5.0 ENVIRONMENTAL ISSUES

### 5.1 The SWRCB's Obligations and Limitations Under CEQA

EID argues that the SWRCB has no authority to condition the proposed change to mitigate significant effects on the environment of Deer Creek. Defenders of Deer Creek, on the other hand, argue that the SWRCB has authority to mitigate the significant effects on the environment, and that the SWRCB should require a subsequent or supplemental EIR to correct deficiencies in the project EIR. For the reasons discussed below, the SWRCB finds and concludes that it has authority to mitigate the effects of the proposed change, and that the SWRCB again is required to make CEQA findings in this order. The SWRCB cannot now require a subsequent or supplemental EIR.

5.1.1 *No Subsequent or Supplemental EIR is Authorized*

The Defenders of Deer Creek argue that the EIR is deficient in numerous ways and that a subsequent EIR should be required to correct the deficiencies. For the following reasons, the SWRCB will not require a subsequent or supplemental EIR in this case. Any action or proceeding alleging that an environmental document does not comply with the requirements of the California Environmental Quality Act (CEQA) must be commenced within 30 days after the filing of a notice of determination by the lead agency. (Pub. Res. Code § 21167(c); 14 Cal. Code Regs. § 15112(c)(1).) EID filed a notice of determination on May 25, 1994.

If no action or proceeding alleging that an EIR does not comply with CEQA is commenced during the 30-day period after the Notice of Determination is filed, the EIR is conclusively presumed to comply with CEQA for purposes of its use by responsible agencies, unless one of the provisions in Public Resources Code section 21166 is applicable. (Pub. Res. Code § 21167.2.) No action or proceeding challenging the compliance of the EIR with CEQA was filed within the 30-day period after EID filed its Notice of Determination. Further, unless one of the events listed in section 21166 has occurred, no subsequent or supplemental EIR can be required. These events are:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. (Pub. Res. Code § 21166.)

In this case, no substantial changes are proposed in the project and no substantial changes exist in the circumstances under which the project is being undertaken. While the Defenders of Deer Creek allege that there is relevant information that was not included in the EIR, such information was available and could have been known when EID certified the EIR as complete.

#### 5.1.2 *SWRCB Authority to Mitigate the Effects of the Proposed Change*

EID argues, notwithstanding the filing of the petitions for reconsideration, that the SWRCB cannot consider evidence regarding environmental impacts of the proposed project because the SWRCB filed a Notice of Determination<sup>7</sup> on October 6, 1994 and no court action was filed within thirty days challenging approval of Order WW-20. The filing of the petitions for reconsideration tolled the running of the statute of limitations. The Notice of Determination filed on October 6, 1995 became ineffective when the SWRCB decided to reconsider the basis for the Notice of Determination, Order WW-20. The final action for purposes of the CEQA statute of limitations will not occur until this order has been adopted.

As discussed in section 3.1 above, the SWRCB properly granted the petitions for reconsideration, which were filed before the end of the 30-day period allowed for filing petitions for reconsideration. Under the Water Code, a petition for reconsideration is an alternative to filing a court action. (Wat. Code §§ 1357, 1360.) If a petitioner had to file a court action to preserve the right to challenge an action, there would be no incentive to file a petition for reconsideration. Also, if a petitioner filed both types of actions, the SWRCB could seek to

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<sup>7</sup> A Notice of Determination provides public notice that the SWRCB has approved a project which is subject to the requirements of CEQA, and it starts a 30-day statute of limitations on filing a court action under CEQA to challenge the project's approval.

have the court action dismissed as being premature because the SWRCB's action was not final. Further, a court action during the pendency of a petition for reconsideration could interfere with the administrative reconsideration process.

Next, EID argues that the SWRCB cannot change the statement of overriding considerations for Order WW-20 which was adopted pursuant to Title 14, California Code of Regulations, section 15093. EID argues that the statement of overriding considerations is solely a CEQA document, and is apart from the SWRCB's action in adopting Order WW-20. Therefore, EID argues, it is untouchable even by the SWRCB because the 30-day statute of limitations has run. EID cites Corona-Norco Unified School District v. City of Corona (1993) 13 Cal.App.4th 1577, 1587, 17 Cal.Rptr.2d 236 for the point that once a statute of limitations has run a court cannot require an agency to impose additional mitigation measures, but neither this point nor the case supports EID's argument. First, the statute of limitations has not in fact run. Second, this case would not preclude the SWRCB from reconsidering its own decision even if the statute of limitations had run. Third, the case did not involve a statute of limitations.

A statement of overriding considerations is required when an action of the SWRCB allows the occurrence of substantial unmitigated effects on the environment which are identified in the final EIR. In the context of a water right action by the SWRCB, which is adjudicatory in nature, the statement of overriding considerations is a conclusion that usually accompanies findings made pursuant to Title 14, California Code of Regulations, section 15091(a)(2) or (a)(3). These findings and the statement of overriding considerations support the SWRCB's order by explaining the SWRCB's reasoning in issuing the order. In other words, the statement of overriding considerations, along with the required findings, are part and

parcel of Order WW-20, and by reconsidering Order WW-20, the SWRCB is reconsidering the section 15091 findings and the statement of overriding considerations.

EID next argues that the petitions for reconsideration could not toll the statute of limitations under CEQA. EID makes this argument on the theory that reconsideration is not a mandatory remedy. EID argues that the petitioners for reconsideration also should have filed petitions for writs of mandate in the superior court against the SWRCB to preserve their positions. This argument fails because the very cause upon which an action under CEQA could have been filed has been removed by the SWRCB's decision to reconsider Order WW-20. While EID claims that the SWRCB has invoked this theory in past decisions, the two cases EID cites do not support this theory. EID cites, first, Order WR 88-6, decided on April 6, 1988. In Order WR 88-6, the SWRCB denied a petition for reconsideration. The SWRCB pointed out in a paragraph that no CEQA action had been filed and that the statute of limitations had run.<sup>8</sup> There is no indication that the issue had been raised by a party, and the paragraph was unnecessary to the conclusions in the order. If in fact a CEQA action had been filed after the petition for reconsideration was denied, the courts, not the SWRCB, would have decided whether the CEQA statute of limitations had run.

In the other SWRCB action EID cites, Water Right Decision 1588, the SWRCB denied a request that it require a supplemental EIR where the lead agency had filed a Notice of Determination several

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<sup>8</sup> *Assuming for sake of argument that filing a petition for reconsideration does not toll the CEQA statute of limitations, the SWRCB, if it granted reconsideration, would still have to consider environmental impacts of any portions of the order or decision which are reconsidered. It is the intent of CEQA that regulatory agencies give major consideration to preventing environmental damage. (Cal. Pub. Resources Code section 21000(g).) Further, the running of a statute of limitations on CEQA should not preclude an agency from further considering opportunities to avoid damage to the environment before adopting its final decision.*

years earlier and the statute of limitations for challenging the adequacy of the EIR had run. This order is consistent with Decision 1588 since the SWRCB will not require a subsequent or supplemental EIR. Decision 1588 does not support EID's argument that the petitioners for reconsideration must also file a petition for writ of mandate in the superior court to toll the statute of limitations on challenging a responsible agency's approval of the project.

#### 5.1.3 *The SWRCB Must Consider Environmental Evidence*

EID argues that the SWRCB cannot consider environmental evidence received during the hearing and cannot impose further environmental conditions on its approval of the proposed project. As noted above, Water Code section 1705.5 specifically contemplates that a party can file a petition for reconsideration of an order that approves or denies approval of a change petition. Under Water Code section 1358<sup>9</sup>, which addresses reconsideration, the Board may receive additional evidence on all pertinent parts of the record. The environmental effects of the proposed project certainly are pertinent.

#### 5.1.3.1 *Reasonableness Doctrine*

As with all uses of water in California, the use of treated waste water is subject to the reasonableness doctrine which is set forth at California Constitution Article X, section 2. This section provides in pertinent part:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or

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<sup>9</sup> "The decision or order may be reconsidered by the board on all the pertinent parts of the record and such argument as may be permitted, or a further hearing may be held, upon notice to all interested persons, for the purpose of receiving such additional evidence as the board may, for cause, allow. The decision or order on reconsideration shall have the same force and effect as an original order or decision." (Wat. Code § 1358.)

unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

Applied to Deer Creek, this reasonableness doctrine requires that the right to use water from the treatment facility as proposed by EID be limited to the amount which is reasonably required for the beneficial uses to be served. Whether a particular use is reasonable depends upon the circumstances presented, and a diversion may be considered unreasonable on the basis of its impacts on fish, wildlife, or other instream beneficial use.

(Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (1986) 26 Cal.3d 183, 191, 194, 200, 605 P.2d 1, 4, 6, 10, 161 Cal.Rptr. 466, 469, 471, 475.)

Currently, the water from the treatment plant is reused by maintaining a substantial zone of riparian habitat. Reductions in the amount of water dedicated to this use should take into account the current uses and should maintain those uses if reasonable. In carrying out its functions under Division 2 of the Water Code, the SWRCB is required to carry out the policy in Article X, section 2. (Wat. Code sections 275, 1050.) Water Code sections 1210-1212, under which the change petition was filed, are within Division 2.

#### 5.1.3.2 *Water Code Provisions*

In addition to the requirement to carry out the reasonableness requirements of Article X, section 2, the SWRCB must comply with the various provisions of Division 2 that govern the SWRCB's consideration of issues involving the diversion and use of water.

Water Code section 1243 declares that the use of water for preservation and enhancement of fish and wildlife resources is a beneficial use of water. Fish and wildlife instream uses, while they do not involve diversions from the stream, are specifically given legal status by section 1243.

Under Water Code section 1211, the SWRCB is required to review changes in the place of use, purpose of use, and point of discharge of treated waste water under the provisions of Water Code section 1700 et seq. Section 1700 et seq. establishes criteria for proposed changes in appropriative water rights. Section 1702 requires that a proposed change will not operate to the injury of any legal user of the water involved<sup>10</sup>.

Each change in an appropriative water right changes the right which originally was approved, and the change requires consideration of the factors to be considered in approving an application. Since a change in the use of treated waste water is to be considered under the laws applying to appropriative water rights, the SWRCB in reviewing the proposed changes must consider the effects of the change on fish and wildlife as required by Water Code sections 1243 and 1243.5<sup>11</sup>.

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<sup>10</sup> There is no case law authority on the question whether the meaning of the term "legal user" includes fish and wildlife where no person or entity has established a formal water right for the fish and wildlife's uses of the water. Such an interpretation, however, would be consistent with existing case law that interprets the Water Code to provide standing for protection of the public trust. (See National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 448-49, 189 Cal.Rptr. 346, 366-67, cert. den. 464 U.S. 977.) Recognition of fish and wildlife as legal users does not limit the SWRCB's authority to balance under the Public Trust doctrine.

<sup>11</sup> Under Water Code section 1243.5 the SWRCB is required, whenever it is in the public interest, to consider the amounts of water needed to remain in the source for protection of beneficial uses, when it determines the amount of water available for appropriation.



### 5.1.3.3 *Application of CEQA to the Project*

Finally, the proposed project is subject to CEQA. Since the project is subject to CEQA, the SWRCB in approving it must make its own findings and impose its own mitigation measures with respect to the environmental effects, and these findings and mitigation measures may differ from those adopted by EID. (14 Cal. Code Regs. § 15096(g) and (h).)

## 5.2 The Impacts, Alternatives, and Mitigation Measures of the Proposed Project

### 5.2.1 *Effects on the Environment of Deer Creek*

Under natural conditions, Deer Creek apparently was an intermittent stream in the reach downstream from the treatment plant. The DFG evaluation dated December 23, 1994 shows that upstream of the treatment plant, Deer Creek is perennial. The Environmental Impact Statement (EIS) for the Deer Creek WWTP, dated April 17, 1972, described Deer Creek as an intermittent stream that depends for water on natural runoff from surrounding low lying hills. It pointed out that the erratic streamflow severely restricted wildlife potential, was detrimental to fishing, and resulted in dead vegetation during periods of no flow in late summer and fall.

The EIS predicted that the treatment plant would change Deer Creek from an intermittent stream to an annual stream with daily flow to enhance vegetation growth and wildlife. The EIS pointed out that the year-round flow from the treatment plant would be a valuable asset to the ecology and environment of the area. It also pointed out that as effluent quantities increased, some effluent could be used for stock watering and pasture irrigation, and that water seepage from the creek bed would help resupply the underground water reservoir. Finally, the EIS predicted that the effluent would be diluted by natural runoff about nine months out of the year and during the remaining three months it would dilute

urban runoff from Cameron Park, which is high in phosphates and nitrogen and low in dissolved oxygen.

As predicted, the treatment plant discharges have increased the downstream flow of water in the creek, allowing it to flow farther in the summer.<sup>12</sup> In the summer, the stream disappears into the creek bed approximately one mile upstream of Scott Road. The treatment plant discharges help support a stream environment that extends approximately 8.5 miles downstream. (About 1 mile upstream of Scott Road.)

With the discharge from the Deer Creek WWTP, Deer Creek downstream from the treatment plant supports populations of native and introduced species of fish. Numerous wildlife use the creek, including birds, mammals, reptiles and amphibians. The creek supports river otters and a large population of northwestern pond turtles, both of which are classified as Species of Special Concern by the Department of Fish and Game. No known species listed under either the state Endangered Species Act (Fish and Game Code § 2050 et seq.) or the federal Endangered Species Act (16 U.S.C.A. § 1531 et seq.) are present along Deer Creek.

The EIR discusses two areas of well-developed riparian vegetation. One extends approximately 3.3 miles in the area of Latrobe Road and the other is near Scott Road in Sacramento County. In the Latrobe Road area canopy heights range from 20 to 60 feet and riparian zone widths range from 50 to several hundred feet. The Legislature has declared that riparian habitat for fish and wildlife is a valuable and finite resource, and that the public interest requires its protection. (Fish and Game Code

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<sup>12</sup> The water right records for Licenses 8176 and 8177 show that between 1969 and 1977 EID also released water from Cameron Park Lake for industrial use at a point 8 miles downstream from the reservoir, or about 3.5 miles downstream from the Deer Creek WWTP.

§ 1386.) Pursuant to Fish and Game Code section 1389, the preservation and enhancement of riparian habitat shall be a primary concern of all state agencies whose activities impact riparian habitat.

If the discharge is reduced so that only 0.5 mgd is flowing in the stream below the discharge point (this is the preferred alternative in the EIR and was approved in Order WW-20), EID's method of calculating the length of wetted stream shows Deer Creek flowing only about 1.1 miles downstream from the treatment plant. This is based on a seepage and evaporation rate of 0.449 mgd per mile used in EID's hydrological model. EID developed a hydrological model which was used in the EIR to calculate the distance downstream that the creek would flow. Instead of evaluating a net flow of 0.5 mgd in the stream, however, the EIR estimated the length of creek to be affected if there were a base flow of 0.28 mgd and a discharge from the treatment plant of 0.5 mgd. (SWRCB 7f, pp. 8 and 12.) This would provide a net flow of 0.78 mgd immediately downstream of the treatment plant. With 0.78 mgd the model shows the stream flowing 1.5 to 1.7 miles.

The EIR evaluated alternative discharge amounts of 0.5 mgd and 0.9 mgd and concluded that either discharge amount would have a significant adverse effect on Deer Creek fisheries. According to the EIR, 96% of the available fishery habitat would be lost if the discharge were 0.5 mgd. The EIR also concluded, however, that a discharge of 1.2 mgd would have no significant effect on stream habitat because historic summer discharges ranged between 0.7 and 1.8 mgd. In evaluating the 1.2 mgd alternative, the EIR did not use the hydrological model to quantify the habitat as it did for the 0.5 and 0.9 mgd alternatives. The model would predict a live stream only 3.3 miles downstream.

Based on its own recent five-month evaluation, the DFG recommended a weekly average minimum discharge from the treatment

plant of 1.0 mgd to be added to the base flow. The long-term historic average discharges from the Deer Creek WWTP have been 1.1 mgd. (SWRCB 7f, p. 12.) In DFG's opinion, a discharge rate of 1.0 mgd would reduce the impacts to the riparian corridor and to the fisheries to a less than significant level. Based on the model, a 1.0 mgd discharge plus the base flow would allow the stream to flow 2.7 to 2.9 miles. The EIR states, however, that flows historically have extended 8.5 miles downstream of the Deer Creek WWTP during the summer. (SWRCB 7g, p. 4-1.) To reach its recommendation of 1.0 mgd, DFG noted that in August 1993 a flow of 1.07 mgd (including a base flow of 0.28 mgd) immediately downstream of the release from the treatment plant was maintaining fishery habitat and the riparian corridor past transect 7, which is 4.5 miles downstream from the treatment plant. Transect 7 is downstream of the 3.3 mile Latrobe Road riparian corridor which DFG considers to be the most important riparian corridor. Considering the historical evidence, it is apparent that the hydrological model underestimates the length of stream that will be maintained by the discharge, and that a discharge of 1.0 mgd will be adequate to avoid significant adverse effects on the environment of Deer Creek.

#### 5.2.2 *The Need for Treated Waste Water for Irrigation Use*

As a general policy, the SWRCB supports the application of treated waste water to beneficial uses. The SWRCB, however, is mindful that when a change in the use of treated waste water is requested, there may be existing reasonable and beneficial uses that will be harmed if all of the treated waste water is taken for another use. On Deer Creek there are well-documented existing beneficial uses of the water discharged from the treatment plant. As discussed above, the water right holders downstream of the treatment plant do not have a claim to the discharged water. The established fish and wildlife uses, however, are legal, beneficial uses of the water that must not be injured by the proposed changes.

The proposed use of the treated waste water to irrigate golf courses and landscaping also is a reasonable and beneficial use of the water. The development will include two golf courses, the first of which was constructed in 1994. The first golf course is projected to use 590 acre-feet per annum, and EID has predicted that its peak daily demand for water will be between 1 and 1.2 mgd. Based on the evidence, however, 1.2 mgd may not be adequate for the golf course during very hot summer periods. The golf course will be irrigated during the months of May through October. The second golf course is projected to be constructed in 1997, and will use the increased supply of water from the treatment plant that will result as the population grows in the areas served by the treatment plant.

The maximum reuse of treated waste water is a primary interest of the people of California. (Wat. Code § 461.) Likely uses of treated waste water include irrigation of agriculture, landscaping and greenbelt areas, ground water recharge, municipal and industrial use, and cooling for thermal electric powerplants. (Wat. Code § 462.) Water Code section 11950 et seq. encourages the reclamation of water by establishing a program to finance or assist in financing projects which will result in additional supplies of usable water. Water Code section 13575 et seq. encourages and facilitates the use of recycled water, but expressly provides that any rights, remedies or obligations under Water Code section 1210 are not to be altered. (Wat. Code § 13582.) Water Code section 13550 et seq. declares that the use of potable water for nonpotable uses, including golf courses, parks, and landscaping is a waste or unreasonable use of water within the meaning of Cal. Constitution Article X, section 2 if the SWRCB finds that reclaimed water is available that meets various conditions. Significantly, one of the conditions, set forth in section 13550 at subdivision (a)(4), is that the use of the reclaimed water will not adversely affect downstream water

rights, will not degrade water quality, and will not be injurious to plantlife, fish, and wildlife.<sup>13</sup>

Consistent with the above statutory policies, the SWRCB herein intends both to leave enough water in Deer Creek to reasonably protect the existing fish and wildlife habitat that is dependent on the discharge of treated waste water and to provide for the use of any amounts over and above the reasonable needs of the existing habitat for the proposed new beneficial uses. The quantity of treated waste water will increase over time as the number of connections in the service area increases. As the quantity increases, there will be more treated waste water than is necessary to maintain the existing habitat that was created by the historic discharge of treated waste water. At the current rate of production by the treatment plant, about 1.8 to 1.9 mgd, and with the golf course needing up to 1.2 mgd, a minimum of between 0.6 and 0.7 mgd could be discharged to Deer Creek to maintain the existing habitat uses. Assuming there will be a base flow of 0.28 mgd, this would result in a minimum flow of 0.88 to 0.98 mgd immediately downstream from the treatment plant discharge to Deer Creek. This rate of flow could have some short-term effects on the creek habitat, but will not have long-term effects, because the habitat is capable of surviving through short periods of water shortage.

### 5.2.3 *Required Findings and Statement Under the California Environmental Quality Act*

When a proposed project will have significant adverse environmental effects, CEQA requires the decisionmaking agency to balance the benefits of the project against its environmental

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<sup>13</sup> While this order does not stem from a proceeding under Water Code section 13550 et seq., it is significant that this section expressly recognizes that existing environmental uses of the treated waste water should not be injured because of the use of treated waste water to replace potable water uses. This section in effect recognizes that existing environmental uses of the treated waste water are an existing reuse of the water.

risks. If the agency decides to allow the occurrence of significant effects, CEQA requires that the agency state in writing the specific reasons for its action. (14 Cal. Code Regs. § 15093.) Accordingly, the SWRCB has balanced the benefits of the project against its unavoidable environmental risks as explained above. As a result of this balancing, the SWRCB has determined that the proposed project should go forward, but should be mitigated to avoid the long term significant environmental effects and to minimize the short term significant environmental effects. Therefore, this order provides that EID shall immediately discharge a minimum of 0.5 mgd of treated waste water to Deer Creek. When there is enough water to supply 0.5 mgd to the creek, this order also will allow up to 1.5 mgd to be delivered to the existing golf course.<sup>14</sup> When the quantity of treated waste water produced by the treatment plant exceeds 2.5 mgd, EID shall discharge a minimum of 1.0 mgd to Deer Creek and may discharge any treated waste water produced by the treatment plant in excess of 1.0 mgd to the added place of use. Until the quantity of treated waste water produced by the treatment plant exceeds 2.5 mgd, EID shall deliver no more than 1.5 mgd to the added place of use.

The conditions of this order may temporarily delay the delivery of quantities of water that exceed the quantity needed for the existing golf course. Additional uses may be served when enough treated waste water is available both to provide 1.0 mgd to Deer Creek and to serve additional irrigation uses in the added place of use.

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<sup>14</sup> Even though EID estimated that a maximum of 1.2 mgd would be needed for the existing golf course, more water, up to 1.5 mgd, may be necessary temporarily during very hot periods. This order is not intended to prevent EID from meeting these needs. However, EID is not to use more water than necessary. Overuse of water could be considered a violation of Cal. Const. Art. X, § 2.

The EIR prepared by EID identifies several significant environmental effects of the proposed project. As EID proposed it, the project would have the following significant effects:

- The project as proposed would have a significant effect on the hydrology of Deer Creek by reducing the summer perennial flow from an average of 1.94 mgd to 0.5 mgd and reducing the length of wetted stream channel to 8.5 miles to one mile.
- The reduction in surface flows in the creek would have a significant effect on fisheries and aquatic habitat and would create a potential for toxicity to fisheries due to decreased water quality.
- There would be significant cumulative effects related to water quality degradation in Deer Creek.

The State EIR Guidelines, at Title 14, California Code of Regulations, section 15091(a) require that a public agency that approves a project for which an EIR identifies one or more significant environmental effects shall make one or more of the written findings set forth in that section for each significant effect, accompanied by a brief explanation of the rationale for each finding. Such findings shall be supported by substantial evidence in the record. (14 Cal. Code Regs. § 15091(b).)

Accordingly, the SWRCB finds that this order requires changes or alterations in the project which avoid or substantially lessen each of the three significant environmental effects of the proposed project as identified in the final EIR. (14 Cal. Code Regs. § 15091(a)(1).) This order will avoid or substantially lessen the above significant effects because it will require enough flows in the creek in the long term to preserve the habitat that was created by the historical discharges.



There may, however, be some short term significant effects until the net discharge from the treatment plant increases to 2.5 mgd or more. The discharge should reach this level by 1997, based on EID's estimates. During the interim, reduced flows will shorten the wetted reach of stream, cause a temporary reduction in fishery and aquatic habitat<sup>15</sup> and increase the potential for water quality degradation in the lower reaches. The potential harm to the habitat is minimal, temporary, and will not cause permanent effects. Therefore, the balance in this case favors proceeding immediately with the initial use of treated waste water for the first golf course in the new place of use and phasing in other uses over time as more treated waste water becomes available. The SWRCB therefore finds that there are economic, social, and other considerations that make the full mitigation measures identified in the final EIR infeasible in the short term. (14 Cal. Code Regs. § 15091(a)(3).)

The existing golf course will need enough water to maintain it while the treatment plant's production rises to 2.5 mgd. Without adequate water, the Development Company would suffer an economic loss, both in terms of having to reestablish or repair the golf course and in terms of lost revenues from the use of the golf course. EID also would suffer an economic loss because it would not be paid for the additional treated waste water. EID's costs of treatment have increased with its improved treatment facilities. The revenues from the sale of treated waste water will help pay for the cost of treatment, reducing the need for sewer rate increases. Additionally, the golf course will have

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<sup>15</sup> Order WW-20 included a condition requiring EID to relocate as many pond turtles as feasible to a newly created aquatic habitat in the added place of use. This order instead requires additional flows in Deer Creek which will, in the long term, mitigate for the effects on the turtles by maintaining their existing habitat. In the short term, this order will protect the turtles better than the condition in Order WW-20. Further, the absence of that condition does not preclude EID from creating new pond turtle habitat in the added place of use when enough treated waste water becomes available under this order.

social benefits in the short term as well as the long term by providing additional recreational opportunities in the area. This justifies the dedication of up to 1.5 mgd to the existing golf course whenever 0.5 mgd or more of treated waste water is discharged to Deer Creek.

The potential short term impacts to the Deer Creek fish and wildlife habitat of this order are overridden by social and economic considerations pertaining to the need to discharge enough treated waste water in the near future to maintain the existing golf course. The immediate discharge of treated waste water to the existing golf course will supplement the existing water supply, will preserve the golf course that has been established, will maximize the use of reclaimed water within EID's service area, and is consistent with state policy. To allow the golf course to go unirrigated or inadequately irrigated would cause harm to the golf course, would reduce recreational opportunities in the area, and would result in economic losses.

#### **6.0 WATER SUPPLIES FOR FIRE PROTECTION**

The SWRCB received evidence that establishes that the water in Deer Creek occasionally is used in an emergency to fight fires. This is a beneficial use of the water. EID correctly argues that an appropriative right is needed to store water for fire protection. None of the petitioners for reconsideration are claiming a storage right for this purpose. It is in the public interest to allow the incidental use of water for fire protection during an emergency, and nothing in this order prevents the direct diversion of water from the flow of the creek to fight a fire. However, there also is no basis to require that EID discharge water to Deer Creek specifically so that it can be used for this purpose if a fire should occur.

## 7.0 SETTLEMENT AGREEMENT AMONG THE PARTIES

On May 2, 1995, the representatives of EID and Defenders of Deer Creek submitted a settlement that set forth terms and conditions that they had agreed could be put into the SWRCB's order. In addition to the settlement submitted for the SWRCB's order, they made two side agreements. One of the side agreements is embodied in a resolution adopted by EID, and it includes a schedule for EID to provide higher discharges to Deer Creek than are specified in the settlement. The other side agreement is a secret agreement between the Defenders of Deer Creek and the Development Company.

A poll of the members of the Defenders of Deer Creek after the settlement was sent to the SWRCB indicates that the majority of the Defenders of Deer Creek support the settlement only if the discharges in the side agreement between EID and the Defenders of Deer Creek are included in the SWRCB's order. EID, on the other hand, took the position that the settlement would be upset if the SWRCB required the discharges that are in the side agreement. Consequently, it appears that the parties are not fully in agreement.

The SWRCB has reviewed the settlement and has analyzed the differences between the settlement and this order. The two are not directly comparable because this order requires a minimum daily average discharge, whereas the settlement would require a total daily discharge and weekly and monthly average discharges. The table set forth below compares the release schedules in the settlement with the terms and conditions of this order.

**COMPARISON OF FLOW SCHEDULES**

Effluent		SWRCB		INTERESTED PARTIES	
		Stage 1	Stage 2		
		Q ≤ 2 mgd	2 < Q < 2.5 mgd	Q ≥ 2.5 mgd	
To Creek	Minimum Daily Average	.5 mgd	Varies between 0.5 and 1.0 mgd (difference between effluent quantity and 1.5 mgd)	1.0 mgd	0.22 mgd
	Minimum Weekly Average	.5 mgd		1.0 mgd	0.7 mgd
	Minimum Monthly Average	.5 mgd		1.0 mgd	0.9 mgd
To Development		< 1.5 mgd	1.5 mgd	> 1.5 mgd	
12-Month Period		182.5 mg		365 mg	328.5 mg

The EIR indicates that the 0.9 mgd discharge would have a significant environmental effect. Also, the minimum daily average discharge of 0.22 mgd proposed in the settlement could result in fluctuations in streamflow that would be harmful to aquatic organisms in Deer Creek. These discharges would not protect the stream environment which was created as part of the original Deer Creek WWTP project as it was approved in 1972. If the SWRCB were to adopt the discharges proposed in the settlement, the SWRCB would have to justify the significant environmental effects in a statement of overriding considerations under CEQA, and these effects could be permanent, not temporary. The fact that EID has agreed on the side to a discharge of up to 1.2 mgd in the future would not relieve the SWRCB of its responsibility to adopt a statement of overriding considerations. The SWRCB must make its own CEQA findings. Further, the SWRCB could not enforce the terms of the EID resolution unless the SWRCB adopted them. The discharges proposed in the resolution are subject to conditions which may not be met in the future. For all of these reasons, this order does not adopt the settlement. This order

nevertheless benefits from the parties' efforts at settlement, and the SWRCB appreciates the parties' efforts.

## 8.0 CONCLUSIONS

Based on the foregoing, the SWRCB concludes that:

1. The petitioners for reconsideration have established adequate cause for the SWRCB to reconsider Order WW-20 which approved a change of point of discharge, place of use and purpose of use of treated waste water discharged from Deer Creek Waste Water Treatment Plant.
2. Order WW-20 may be reconsidered under Water Code section 1357.
3. The Department of Fish and Game has standing to participate in hearings of the SWRCB.
4. The SWRCB gave notice of the hearing far enough in advance to meet the statutory requirements.
5. Under Water Code section 1210 et seq. the treatment plant owner's right is superior to that of the supplier of the water, but these sections do not disturb existing rights of legal users of the treated waste water.
6. Changes in the way that water from the Deer Creek WWTP is used should be made with consideration of the current reasonable and beneficial uses and the public interest and welfare.
7. The water from the treatment plant should be used to achieve as much benefit as possible.

8. Holders of riparian water rights downstream of the treatment plant have rights to the natural flow of Deer Creek whenever the natural flow reaches them, and holders of appropriative water rights can appropriate any water present in the creek in accordance with their priorities and within the limits of their rights, but their rights to the treated waste water are junior to EID's. The right to have water in Deer Creek from the treatment plant is limited to the amount of water that is reasonably required for the instream beneficial uses to be served.
9. The law of return flows should be applied to discharges from a waste water treatment plant.
10. The EIR is final, and no basis exists to prepare a subsequent or supplemental EIR, but the action of the SWRCB in adopting Order WW-20 was challenged and did not become final. This order contains findings required by CEQA. A statement of overriding considerations is included to cover the possibility that this order may cause short term significant environmental effects. The SWRCB considered evidence presented during the hearing on environmental effects of the project and herein requires measures to mitigate the significant environmental effects of the project.
11. Considering the needs of plants and animals using Deer Creek and the limited dedication of water to be discharged to Deer Creek, the SWRCB finds that no water remains available for appropriation from Deer Creek during the months of May through October.

**ORDER**

**IT IS HEREBY ORDERED THAT** treated waste water change petition WW-20 filed by El Dorado Irrigation District on September 14, 1992 pursuant to Water Code sections 1210 and 1211 is approved, subject to the following terms and conditions:

1. The source of treated waste water shall be from the Deer Creek Waste Water Treatment Plant located within Section 15, T9N, R9E, MDB&M: California Coordinate System: Zone 2, North 353,200, East 2,290,750.
2. Irrigation shall be added as a purpose of use of the treated waste water. This purpose of use is in addition to the existing purposes of use for habitat and fish and wildlife preservation within Deer Creek.
3. The added place of use and point of discharge shall be within the El Dorado Hills Development, north of Highway 50 near Cameron Park, as shown on a map on file with the State Water Resources Control Board. This place of use and point of discharge are in addition to the existing point of discharge to Deer Creek and in addition to the existing place of use of treated waste water in Deer Creek downstream from the waste water treatment plant.
4. EID shall install continuous recording devices at the outlet to Deer Creek and in the pipe used for delivery to the added place of use from the waste water treatment plant. Such measuring devices shall be satisfactory to the SWRCB and capable of measuring the flows discharged to Deer Creek and to the added place of use. Said measuring devices shall be installed and operational no later than August 1, 1995, and shall be properly maintained thereafter. The measuring devices shall be monitored on a weekly basis. A record of the measurements and their sum shall be maintained by EID and made available for inspection by interested parties upon reasonable request. A copy of the records shall be submitted annually to the Chief, Division of Water Rights. Construction, operation, and maintenance costs of the measuring devices are the responsibility of EID.





6. The SWRCB reserves jurisdiction in the public interest to modify the terms and conditions of this order, including imposition of requirements to alter project facilities or operations and to modify instream flow releases. SWRCB action will be taken only after notice to interested parties and opportunity for hearing.

#### CERTIFICATION


The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 22, 1995.

AYE: John Caffrey  
Mary Jane Forster  
James M. Stubchaer  
John W. Brown

NO: None

ABSENT: Marc Del Piero

ABSTAIN: None

  
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Maureen Marché  
Administrative Assistant to the Board