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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Water Right)	
Application 30298,)	
DIANE STULLER,)	ORDER: WR 97-04
Applicant,)	SOURCE: Unnamed Stream
HARLAN KANT ET AL.,)	Tributary to Coleman
Protestants.)	Valley Creek
_____)	COUNTY: Sonoma

ORDER DENYING PETITION FOR RECONSIDERATION OF
DECISION 1636

BY THE BOARD:

1.0 INTRODUCTION

The State Water Resources Control Board (SWRCB or Board) adopted Water Right Decision 1636 on April 17, 1997. The decision approved issuance of a water right permit on Application 30298 filed by applicant Diane Stuller to appropriate 9 acre-feet of water per annum (afa) to storage for irrigation of a 10-acre vineyard. The water is to be diverted from an unnamed stream tributary to Coleman Valley Creek in Sonoma County. On May 19, 1997, the SWRCB received a petition for reconsideration of Decision 1636 from attorney Harlan Kant, filed on behalf of himself and several other parties who had filed protests against Application 30298.¹ The issues raised by the petition for

¹ The petition for reconsideration is considered to be filed within the time allowed by Water Code section 1122. The 30-day period following adoption of Decision 1636 ended on Saturday, May 17, 1997. The petition for reconsideration was received by the SWRCB on Monday, May 19, 1997, the first
(Footnote continued next page)

reconsideration are addressed in Sections 4.0 through 4.5. For the reasons explained below, this order denies the petition for reconsideration.

2.0 GROUNDS FOR REQUESTING RECONSIDERATION

Section 768 of Title 23 of the California Code of Regulations provides that a party can petition for reconsideration of an SWRCB decision or order upon any of the following causes:

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

3.0 SUMMARY OF PETITION FOR RECONSIDERATION

Petitioner Kant requests reconsideration on each of the four grounds specified in Section 768 of Title 23. The petition argues: (1) the evidence does not support the SWRCB's finding that water is available for appropriation; (2) that there is new evidence available concerning the potential effect of the project on threatened and endangered species; and (3) the findings of Decision 1636 regarding geology, traffic, and noise are not supported by the record. The statement of points and authorities submitted in support of petitioner's arguments contends that the SWRCB has not complied with the requirements of the California

business day following May 17. The petition does not specifically identify
(Footnote continued next page)

Environmental Quality Act ("CEQA," Public Resources Code section 21000 et seq.) in several respects. Petitioner's statement of points and authorities also argues that SWRCB approval of the project is not in the public interest and violates riparian rights and the public trust doctrine.

4.0 ISSUES RAISED IN PETITION FOR RECONSIDERATION

The issues raised in the petition for reconsideration are addressed below.

4.1 Findings Regarding Water Availability

Decision 1636 contains an extensive explanation of the SWRCB's analysis of water availability for the project under consideration. (Decision 1636, pp. 6-10.) An important factor in determining the quantity of run-off which could be expected above the applicant's point of diversion is the area of the upstream watershed. In view of conflicting estimates regarding the area of the watershed, Decision 1636 relied upon delineation of the watershed using the U.S.G.S. topographic map for the Camp Meeker Quadrangle. (Staff 2.)

Rather than determining the size of the watershed from the U.S.G.S. maps, petitioner argues that the SWRCB should have used one of the earlier, and lower, estimates of watershed size. Petitioner also argues that, using various other assumptions outlined in the petition, the quantity of expected run-off calculated in Decision 1636 is excessive and that the protestants to the application "clearly demonstrated that there is not

what other parties Mr. Kant represents at this stage of the proceedings.

sufficient water available for this Project in almost 4 out of 10 years." In addition, petitioner argues that approval of the project "makes a mockery of James Noyes' (the downstream owner) riparian rights" and that "[r]iparian owners are to be afforded protection against material diminishment of flows." (Petition for Reconsideration, p. 2.)

With respect to petitioner's argument concerning water availability, Decision 1636 explains how water availability was calculated and refers to evidence in the record on which those calculations are based. The assumptions utilized in the SWRCB's analysis are conservative, and it is likely that the actual amount of water available for appropriation by the applicant in most years will be more than sufficient to meet her permitted right. The fact that petitioner calculates a lower estimate of water availability based on different assumptions does not mean that the SWRCB's previous findings are not supported by substantial evidence.

With respect to petitioner's contentions regarding alleged interference with riparian rights, the SWRCB responds as follows:

- (1) There is no evidence in the record that James Noyes diverts any water from the stream under riparian rights or otherwise.
- (2) As explained in Decision 1636, the flow in the stream as it reaches the Noyes property will include the water bypassed at the applicant's point of diversion, water from a tributary stream

which enters about 150 feet below the applicant's point of diversion, and other inflow along the course of the stream. (Decision 1636, p. 9.)

- (3) Prior to entry of Decision 1636, the applicant agreed to amend her application to exclude the entire season during which Brooks and Andrea Austin divert water at a downstream location under riparian claim. (Decision 1636, p. 8.)

- (4) Contrary to petitioner's assertion, riparian claimants in California are not entitled to "protection against material diminishment of flows." Ever since the amendment of the California Constitution in 1928, riparians have been subject to the same reasonableness limitations as apply to all other water users in the State. (See Calif. Const., art. X, § 2.) While diversion of water under riparian rights normally continues to have priority over later appropriations, riparians do not have a right to insist that there be no material diminishment of flow reaching their property. (*Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424 [90 P.2d 537, 548].)

Based on the above, the SWRCB concludes there is substantial evidence in the record to support our prior finding of water availability for the proposed project and that the proposed

project will not interfere with the riparian rights of downstream property owners.

4.2 Effect of Project on Fish and Wildlife

Petitioner argues that there is "new information" available which "provides substantial evidence from which a fair argument can be advanced that this Project poses significant potential detrimental impacts to the environment and the public interest." (Petition for Reconsideration, p. 4.) The "new" information to which petitioner refers includes: (1) the listing of coho salmon as a threatened species under the federal Endangered Species Act; (2) a letter from a Department of Fish and Game employee indicating that coho salmon could be present beneath a waterfall located downstream of the project; (3) the presence of the California red-legged frog downstream on the James Noyes property; (4) and the presence of steelhead in Coleman Valley Creek.

Beginning with the federal listing of coho salmon as a threatened species, the record shows that the National Marine Fisheries Service proposed that the coho salmon be listed as threatened on July 25, 1995. (60 Fed.Reg. 38011.) The National Marine Fisheries Service concluded that coho salmon should be listed as threatened on October 31, 1996, prior to the SWRCB hearing on November 5, 1996. (61 Fed.Reg. 56138.) The U.S. Fish and Wildlife Service included coho salmon on the list of threatened species on November 20, 1996. (61 Fed.Reg. 59028.) Although petitioner did not address the status of coho salmon as a threatened species at the hearing, he brought the issue to the

SWRCB's attention in a series of letters submitted after the hearing. (Decision 1636, p. 17.)

In response to petitioner's letters, Decision 1636 took official notice of the National Marine Fisheries Service decision regarding listing of coho salmon as a threatened species. Rather than recommending a prohibition on all water diversions from affected streams and their tributaries, the National Marine Fisheries Service explained that water diversions which have a properly designed fish screen and which do not result in instream flow conditions adverse to coho salmon will not violate the federal Endangered Species Act. (61 Fed. Reg. 56147.) Decision 1636 explains why the fish screen requirement is not applicable to a project at a location where no coho salmon are present, and why the project would not result in adverse flow conditions downstream where coho salmon may be present. (Decision 1636, pp. 17 and 18.)

The March 28, 1997, letter from a Department of Fish and Game employee describes the general type of conditions in an upstream watershed which could be harmful to coho salmon and steelhead, but does not allege that the Stuller project will cause those conditions. The Department of Fish and Game employee's stated concern about reduction of flows during "the critical dry season" would not be expected to apply to the present project which limits the season of diversion to the winter months.

As noted in Decision 1636, the subject of the California red-legged frog was addressed in the staff analysis on Application 30298. (Staff 1a, p. 1.) The analysis states that the

California Department of Fish and Game advised SWRCB staff that the proposed project would not be expected to have an adverse impact on the California red-legged frog.² Under the provisions of Water Code section 1345 et seq., the findings of a staff analysis for minor protested water right applications provide a sufficient basis for acting on an application unless a hearing is requested on specific unresolved issues. In this instance, Petitioner Kant requested a hearing but offered no evidence to refute the finding of the staff analysis that the proposed project would not be expected to adversely impact the California red-legged frog.

The record shows that the SWRCB considered the evidence in the record regarding potential effects of the proposed project on fish and wildlife, and that Decision 1636 includes all the conditions of approval recommended by the Department of Fish and Game. The petition for reconsideration repeats much of petitioner's prior speculation and general statements of concern, but cites no new evidence which would justify reconsideration of Decision 1636.

4.3 Geology, Traffic, and Noise Considerations

Petitioner alleges that the project "needs further study to show that public safety and habitat of ESA-listed species will not be threatened by the questionable geology and soil types present at the site." (Petition for Reconsideration, p. 4.) However, the record shows that the project in question has been subject to an

² The SWRCB notes that the applicant's project is located outside of the area in which the California red-legged frog has been listed as threatened under the federal Endangered Species Act.

unusual amount of geologic study as compared to similar projects which come before the SWRCB. The applicant presented testimony by a registered engineer and a detailed report from a certified engineering geologist which support the conclusion that geologic considerations provide no basis for disapproval of the project. (Decision 1636, p. 12.)

In contrast to the evidence presented by the applicant, petitioner Kant had two geologists visit the project site but presented no testimony or written reports from either one which would indicate that the project "endangers public health." To continue to argue that the project poses a threat to public safety in the absence of any supporting evidence is an abuse of the water rights process.

The petition for reconsideration contends, without elaboration, that:

"The Decision regarding Noise and Traffic issues are [sic] simply not supported by the evidence as detailed in Protestant's Closing Argument to which the Board is referred for further details."

Since petitioner's closing argument was submitted prior to entry of Decision 1636, it is not apparent what particular findings of the subsequent decision are disputed by petitioner. The subjects of the effects of the project on noise and traffic, and the relationship between the project and the elements of the Sonoma County General Plan which deal with noise and traffic, are discussed on pages 12 through 14 of Decision 1636.

The findings of Decision 1636 regarding geological considerations, noise, and traffic are supported by the record. The

petition for reconsideration provides no basis for changing those findings.

4.4 Compliance With the California Environmental Quality Act

The legal arguments presented in petitioner's points and authorities focus primarily on the subject of CEQA compliance. Petitioner argues: (1) an EIR should have been prepared because the evidence supports a fair argument that the project may have a significant effect on the environment; (2) the negative declaration must be recirculated because significant new mitigation measures were added to the conditions contained in the proposed negative declaration; (3) the SWRCB did not comply with applicable requirements regarding posting the notice of intent to adopt a negative declaration; and (4) the SWRCB's analysis did not consider all phases of the project and did not include a cumulative impact analysis. Each of these arguments is addressed below. For the reasons discussed in Sections 4.4.1 through 4.4.4, the SWRCB concludes that it has complied fully with the requirements of CEQA.

4.4.1 Substantial Evidence of a Significant Effect on the Environment

Public Resources Code section 21080(c) provides that a negative declaration is the appropriate environmental document if:

"(1) There is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment."

or

"(2) An initial study identifies potentially significant effects on the environment, but

(A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment."

In this instance, the initial study identified potentially significant effects on the environment but the requirements of section 21080(c)(2) were complied with fully. The applicant agreed to revisions that would avoid or mitigate the effects of the project to a point where no significant effect on the environment would occur. In view of the conditions included in the negative declaration, there is no substantial evidence in light of the whole record before the SWRCB that the revised project may have a significant effect on the environment.

At the time the initial study was circulated, the issue of what constitutes substantial evidence for purposes of CEQA was addressed in Section 21080(e) as follows:

"Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment, is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Emphasis added.)

Applying the above standard, it is apparent that petitioner has not presented--and the record does not include--substantial

evidence that the project authorized by Decision 1636 may have a significant effect on the environment.³ To the contrary, petitioner's objections are based almost entirely on "argument, speculation and unsubstantiated opinion."

4.4.2 Condition Requiring Bypass of 25 Percent of Reservoir Inflow

Petitioner contends that shortening the diversion season and including a 25-percent bypass flow requirement as a condition of Decision 1636 is an additional mitigation measure which requires recirculation of the negative declaration. There are a number of relevant facts to consider with respect to the bypass flow condition established in Decision 1636. The reservoir in question will capture a portion of the intermittent flows from the upper reaches of an ephemeral stream (swale) which has very little vegetation and long periods of no flow. The initial study for purposes of CEQA did not conclude that diversion of water by the project may have an adverse effect on downstream uses, nor is there any substantial evidence in the record supporting that conclusion. As explained on pages 8 and 9 of Decision 1636, the provision requiring bypass of 25 percent of reservoir inflow was agreed to by the applicant in an effort to resolve the concerns of downstream protestants.⁴ Since the 25-percent bypass flow requirement was not developed to mitigate a significant adverse

³ Section 21080(e) was amended in 1996, but the amendment would not change the SWRCB's conclusion that there is no substantial evidence that the project may have a significant effect on the environment.

⁴ Decision 1636 finds that, even without the reduced season of diversion and bypass flow requirement agreed to by the applicant, there was no evidence that water diverted for the project would have any adverse impact on the availability of water for diversion downstream by the Austins under claim of riparian right during the irrigation season.

environmental impact, the fact that the applicant agreed to inclusion of a bypass flow requirement as a condition of her permit does not require recirculation of the negative declaration.

4.4.3 Notice of the SWRCB's Intent to Adopt a Negative Declaration

Petitioner argues that the SWRCB provided inadequate notice of its intent to adopt a negative declaration for the project because neither he nor others with whom he spoke saw the public notice that was posted near the project site. The record shows: (1) notice of the intent to adopt a negative declaration was posted in accordance with applicable requirements, and (2) notice was also mailed to all parties who had previously filed protests against Application 30298 in response to the Notice of Application to Appropriate Water dated May 6, 1994. Petitioner has not identified any specific person who did not receive notice of the intent to adopt a negative declaration and who now seeks reconsideration based on lack of notice. To the contrary, petitioner indicates that he and the other protestants to Application 30298 were notified of the SWRCB's intent to adopt a negative declaration.

In summary, the record shows that the notice requirements of Title 14, California Code of Regulations, section 15072 were met and that petitioner received actual notice of the SWRCB's intent to adopt a negative declaration. The fact that he would have preferred that notice be provided by some additional means is no basis for reconsideration of Decision 1636.

4.4.4 Consideration of All Phases of the Project and "Cumulative Impacts"

Petitioner alleges that Decision 1636 should be reconsidered because it "does not consider all phases of project planning, implementation and operation, including phases planned for [the] future." Petitioner further alleges that the "failure to examine the entire scope of the Project is compounded by the lack of cumulative impact analysis." (Petition for Reconsideration, p. 7.)

It is not clear what phases of the project petitioner believes have not been considered. Decision 1636 includes a number of conditions governing construction of the dam and reservoir, restrictions on the amount of water diverted and the season of diversion, a bypass flow requirement at the point of diversion, restrictions on planting of undesired fish in the reservoir, and a provision that all use of pesticides at the project must be in compliance with applicable statutes and regulations.

The initial study for the project considered the possibility of cumulative impacts, but concluded that the project would not result in cumulative impacts. (Stuller E-3, p. 11.) Petitioner now alleges that the "precedent setting nature of approving water use for this type of Project in the Salmon Creek Watershed will encourage other grape growing operations to apply for appropriative water rights." This argument conflicts with petitioner's testimony at the time of the hearing. Petitioner testified that he did not think the project was economically viable and that the surrounding neighborhood currently does not have other agricultural uses or facilities "other than a few cows

and sheep grazing." (T 94:12-94:22.) Petitioner also testified that because the area gets a lot of fog, it is not suitable for grapes. (T 116:2-116:11.) Petitioner went on to testify: "I don't think it will make any economic sense. I'm probably doing the applicant a big favor by stopping the project." (T 128:15-128:17.)

For the reasons stated on page 19 of Decision 1636, the SWRCB cannot predict the economic success of the project. In any event, there is no evidence in the record that this project has possible environmental effects which are individually limited but cumulatively considerable. To the contrary, the evidence indicates that this is the only vineyard project in the immediate area, and that appropriate permit conditions have been included to avoid or mitigate any potentially significant adverse environmental effects.

4.5 SWRCB Determination Regarding Reasonable and Beneficial Use

In his final argument for reconsideration of Decision 1636, petitioner argues that the Board needs to take a number of factors into account in reaching a determination whether the project will result in a reasonable beneficial use of water.⁵ The petition states:

⁵ Petitioner states that the Board's determination should take the following factors into account:

"(1) accurate data concerning water availability; (2) suitability of the intended use and economic viability given the climate and soils data; (3) protection of riparian rights; (4) public interest; and (5) public trust doctrine." (Petition for Reconsideration, p. 8.)

A review of Decision 1636 and the permit terms and conditions required by that decision indicates that the factors cited by petitioner were taken into account in reaching the decision.

(Footnote continued next page)

"The Board needs to exercise its independent judgment in making the determination regarding reasonable beneficial use. The Decision does not indicate that anything more than 'rubber stamping' the Staff's inadequate and erroneous conclusion actually occurred." (Petition for Reconsideration, p. 8.)

Although Decision 1636 largely confirms the conclusions reached in the staff analysis, it does not represent a "rubber stamping" of that document. Decision 1636 is based upon review and analysis of the record, including the substantial evidence presented by the applicant, the limited evidence presented by petitioner, input from the Department of Fish and Game and information from the statutorily mandated staff analysis. Decision 1636 reflects the SWRCB's findings and conclusions regarding the issues under consideration based on the entire record.⁶

5.0 CONCLUSION

For the reasons discussed above, the SWRCB concludes that the petition for reconsideration should be denied.

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⁶ The SWRCB notes that petitioner did not avail himself of the opportunity to appear in opposition to the proposed decision at the April 17, 1997, Board meeting at which the decision was adopted.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration filed by Harlan Kant is denied.

CERTIFICATION

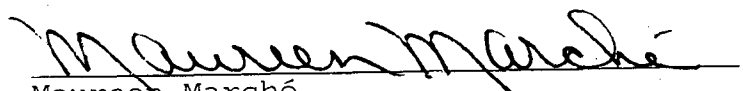
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 2, 1997.

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

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

