

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 99 - 010

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In the Matter of the  
Petition for Reconsideration of  
Division of Water Rights Decision 99-01  
Which Approved Application 29664 of  
the Garrapata Water Company  
Subject to Specified Conditions

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SOURCE: Garrapata Creek Subterranean Stream

COUNTY: Monterey

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**ORDER DENYING PETITION FOR RECONSIDERATION**

**BY THE BOARD**

**1.0 BACKGROUND**

On September 24, 1999, the Division of Water Rights (Division) of the State Water Resources Control Board (SWRCB) adopted Division Decision 99-01 (DD 99-01) which approved Application 29664 of the Garrapata Water Company (Company) subject to specified conditions. DD 99-01 is based on all of the available information that is contained in the Division's files regarding Application 29664. As part of its review of the application, the Division conducted a field investigation, and allowed the applicant and protestants to participate and present information, in accordance with the procedures for minor protested applications set forth in Article 1.5 (commencing with section 1345) of Chapter 5 of Part 2 of Division 2 of the Water Code. The field investigation was held on January 27, 1997.

Application 29664 was the subject of a hearing held February 1-2, 1999, and an SWRCB decision, Decision 1639. The hearing and decision were limited to specific issues involving the applicability of the water right permit system to the proposed diversion and the applicability of the California Environmental Quality Act (CEQA), issues that are not involved in the petition for reconsideration now before the SWRCB.

DD 99-01 authorizes the Company to divert up to 35 acre-feet per annum (afa) from the Garrapata Creek subterranean stream year round for domestic use. The maximum rate of diversion cannot exceed 0.11 cubic feet per second (cfs). To carry out the SWRCB's duty of continuing supervision to apply the public trust doctrine, the Division included the following term in DD 99-01:

"For the protection of public trust resources of Lower Garrapata Creek, the permittee shall allow visible flow in Garrapata Creek downstream of the point of diversion. If visible flow does not exist in Garrapata Creek, downstream of the point of diversion, the permittee shall cease diversions or augment the stream flows to ensure a visible flow exists. This term does not apply if the permittee can document that 100 yards upstream of the point of diversion there is no visible flow."

On October 25, 1999, the California Department of Fish and Game (DFG) filed a petition for reconsideration of DD 99-01 with the SWRCB pursuant to California Code of Regulations, title 23, section 768 (b). The petition was filed on time. In its petition, DFG contends that the public trust term contained in DD 99-01 is not supported by substantial evidence and does not adequately protect steelhead trout in Garrapata Creek. DFG requests that specified changes be made to DD 99-01.

## **2.0 THE LAW GOVERNING RECONSIDERATION**

### **2.1 Applicable Law**

Water Code section 1347 provides that a Division decision issued following a field investigation of a minor protested application is subject to review as provided in Chapter 4 of Part 1 of the Water Code (commencing with section 1120). Water Code section 1122 provides for reconsideration of decisions upon the SWRCB's own motion or upon petition filed within 30 days of adoption of the decision. Title 23, California Code of Regulations, section 768 provides that an interested person may petition for reconsideration 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;
- "d. Error in law."

Requirements for petitions for reconsideration are set forth in California Code of Regulations, title 23, section 769. Subdivision (b) of section 769 requires that if reconsideration is based in whole or in part on an argument that there is relevant evidence that is not in the record, the petition must include an affidavit or declaration under penalty of perjury which states that new evidence is available that could not have been presented and the reason it was not presented. The petition shall also include a general description of the evidence and of the facts to be proved. Subdivision (c) of section 769 provides that petitions for reconsideration shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.

Actions which the SWRCB may take on reconsideration are set forth in California Code of Regulations, title 23, section 770. The SWRCB may refuse to reconsider the decision, deny the petition, set aside or modify the decision, or take other appropriate action.

## **2.2 Compliance with the Law Governing Reconsideration**

In its petition, DFG states that it petitions the SWRCB pursuant to California Code of Regulations, title 23, section 768 (b) [the decision is not supported by substantial evidence]. However, DFG submits a declaration with its petition that contains a new recommendation and new information that was not presented at the field investigation and is not in the SWRCB's files, and asks the SWRCB to modify DD 99-01 based on the information in the declaration. In accordance with subdivision (b) of section 769, DFG should have included an affidavit or declaration under penalty of perjury stating that it had new evidence that could not have been presented at the field investigation and the reason it was not presented. DFG's petition is defective for failure to include the affidavit. Accordingly, the SWRCB will only consider whether the public trust term in DD 99-01 is supported by substantial evidence.

Applying these procedural rules in the context of a petition for reconsideration of a Division decision issued after a field investigation of a minor protested application furthers the public policy behind the minor protested applications procedure. The procedures for review of minor protested applications were adopted by the Legislature to implement the recommendations of the Governor's Commission to Review California Water Rights Law (Commission). The Commission was very concerned about the backlog of applications to appropriate water, recommended reforms to address the backlog problem, and proposed specific statutory language to implement its recommendation. (Governor's Commission to Review California Water Rights Law, Final Report (December 1978).) One of its recommendations was to expedite the processing of protested applications involving diversions of small amounts of water. In 1980, the Legislature adopted the Commission's legislative proposal in verbatim form and sections 1345 through 1348 were added to the Water Code. The purpose behind recent amendments to the minor protested applications procedures adopted by the Legislature in 1997 was to further streamline the process. Those amendments became effective January 1, 1998. (Stats. 1997, ch. 323 (SB 849).) To allow DFG to propose new terms and introduce new evidence long after the field investigation would frustrate the legislative intent to expedite the processing of applications to appropriate only a small amount of water such as the application filed by the Company in the matter before us.

### **3.0 DEPARTMENT OF FISH AND GAME'S PETITION**

DD 99-01 states that DFG did not submit specific recommendations for a flow regime to protect steelhead. DFG claims that it was not asked to submit such a specific recommendation because that was not the purpose of the SWRCB hearing held on February 1-2, 1999. DFG is correct that the purpose of the SWRCB hearing did not include obtaining evidence to establish instream flow requirements for Garrapata Creek and DFG had no reason to submit evidence on the issue at the hearing. The issues considered at the field investigation included issues related to flows needed to protect instream uses, however, and if DFG had specific recommendations concerning a flow regime to protect steelhead, it should have presented those recommendations at the field investigation.

The purpose of the field investigation held on January 27, 1997, in accordance with Water Code section 1345, was to collect information and evidence relating to Application 29964 and DFG's protest to Application 29664.<sup>1</sup> The Notice of Field Investigation dated December 23, 1996, provided that the Company and DFG, among others, would be provided an opportunity to present evidence to Division staff at the field investigation. The Notice stated:

"Protestants should provide evidence that demonstrates that approval of the project will cause specific injury to the environment or to other downstream users. The applicants and the protestants are encouraged to develop terms or conditions that would resolve the issues raised by the protests to the mutual satisfaction of all parties."

Accordingly, if DFG wanted the Division to impose terms or conditions, including instream flow requirements, DFG should have submitted them, along with supporting evidence, at the field investigation. Contrary to the assertion of DFG in its petition, the SWRCB is not required to hold a hearing to consider what measures are necessary to protect public trust resources. (Wat. Code, §§ 1345, et seq.)

Although DFG attended the field investigation, it did not submit evidence in support of its protest at the field investigation. DFG also did not submit proposed terms or conditions, including instream flow requirements, at the field investigation. Division staff gave DFG an additional 30 days after the field investigation to provide evidence in support of its protest. The Company was not provided the same opportunity.

On February 26, 1997, DFG submitted a Memorandum to the Division in which it stated that:

"Appropriate studies must be conducted to determine necessary instream flows to protect the fishery resource. . . . Until instream flow requirements are established, the Department recommends that a flow rate of 0.25 cfs, or the natural water flow, be required prior to diversion by Garrapata Water Company."

No supporting evidence was provided by DFG to establish the basis for 0.25 cfs.

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<sup>1</sup> DFG filed a protest to Application 29664 which alleges that cumulative impacts of water diversions within the Garrapata Creek watershed are causing low flows in the creek. The protest does not specifically allege that the Company is or may be adversely impacting fish and wildlife resources in Garrapata Creek.

The Company has been diverting water from the subterranean stream since 1962. It has never diverted water from the surface stream. Although the stream depletion effect of the Company's well has not been measured, it appears to be negligible because there are no apparent negative effects on instream resources due to the Company's diversion.

DFG assumes that the Company's groundwater diversion from the subterranean stream will have a significant effect on the surface flow. There is no evidence in the record to support that assumption, and the opposite is more likely true. The Company's well pumps at a rate of 50 gallons per minute and delivers water to the main holding tanks. According to the Company, the pump is on "only a fraction of each day, depending on usage by customers." DD 99-01 limits the rate of diversion to 0.11 cfs.

Garrapata Creek is a perennial stream and has summer flow, even during drought years. The evidence in the record shows that Garrapata Creek has never dried up. DD 99-01 states that fish and the riparian corridor downstream of the Company's point of diversion need a continuous flow of water to maintain pools and to water the riparian habitat. This continuous flow, even during the summer, has existed in the past while the Company has been diverting water from the subterranean stream. To ensure that the Company continues to allow this flow to pass, the Division included the public trust term in DD 99-01.

In its petition, DFG states:

"Decision 99-01 also reports that the Department testified that on one site visit in November, the Department had found 18 steelhead that were in good condition. The Board has taken this isolated statement and expanded it to stand for the proposition that all steelhead in Garrapata Creek are in good condition. As the Department has repeatedly testified to the Board, the condition of fish is dependent upon habitat conditions, not just a simple measure of weighing and measuring a single set of fish."

DFG's argument does not adequately reflect the reasoning of DD 99-01. DD 99-01 states:

"During the 1999 SWRCB hearing, DFG submitted evidence relating to the condition of the steelhead in the 1,500-foot long stream reach between the Company's well and the mouth of the creek and in the lagoon. This evidence included a stream survey conducted by DFG staff in 1990 and two surveys conducted by DFG in 1998, immediately prior to the SWRCB hearing.

"In 1990 the DFG conducted a survey to assess the condition of the fishery resources throughout the entire Garrapata Creek watershed. The summary report prepared by DFG staff states that steelhead are generally in good condition throughout the watershed and the lower portion of Garrapata Creek below the Company's point of diversion. DFG concluded that the major problems impacting fishery resources are due to sedimentation from the granitic soils resulting from past logging practices and improper road grading, not stream depletion caused by the Company pumping its well.

"On November 6, 1998, DFG conducted an on-site field investigation to observe stream habitat conditions prior to the SWRCB hearing. DFG staff estimated the flow to be 4 cfs and the water depth to be 1 1/2 to 2 feet deep in the vicinity of the Company's point of diversion. Photographs accompanying the DFG exhibit indicate that the creek is approximately 10 to 20 feet wide. DFG staff stated that steelhead habitat looked to be in fair condition. Steelhead were observed in the stream section between the point of diversion and the lagoon. According to DFG, lagoons can be more productive for steelhead rearing than the stream itself. Water depth in the lagoon was relatively deep. DFG staff stated that they observed many steelhead in the upper end of the lagoon, ranging in size from 3 to 10 inches.

"On November 24, 1998, DFG conducted an electroshock survey of Garrapata Creek about 0.25 mile upstream of the Highway 1 bridge, near the Company's point of diversion. The electroshock sample was conducted in a pool about 100 yards long. A total of 18 steelhead were surveyed ranging in length from 77 to 135 mm. (i.e., about 3 to 4 inches). DFG stated that all steelhead that were examined were in good condition. Photos submitted with the DFG exhibit indicate that the stream reach is about 10 to 20 feet wide."

As indicated by the discussion of the issue in DD 99-01, there were many statements by DFG in the record, not one isolated statement as DFG contends. Further, DFG has not shown the need for additional measures to protect steelhead beyond the term contained in DD 99-01. The evidence in the record shows that steelhead are in good condition at and below the Company's point of diversion.

In its petition, DFG requests that the following changes be made to Decision 99-01:

- "1. Delete the requirement that the Company be required to bypass 'visible surface flow' whenever it is diverting water and there is a visible surface flow 100 yards upstream of the Company's well. Substitute the requirement that the Company be required to bypass 60 percent mean annual unimpaired flows.
- "2. Add a requirement that stream gauges be installed at appropriate locations.
- "3. Limit the permit term to 5 years.
- "4. Include a provision for reasonable access to diversion facilities for compliance-monitoring purposes by Board and Departmental personnel.
- "5. Limit diversion when the flow in Garrapata Creek is below a certain level.
- "6. Add a requirement that the Company institute mandatory water conservation measures similar to measures applied by the Board in water short areas throughout the State."

DFG did not propose these terms at the field investigation and the terms are not supported by the evidence in the record.<sup>2</sup> Accordingly, DD 99-01 should not be modified as proposed by DFG.

#### 4.0 CONCLUSION

The SWRCB concludes that:

1. DD 99-01, including the public trust term, is supported by substantial evidence.
2. DD 99-01 adequately protects steelhead trout in Garrapata Creek.

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<sup>2</sup> The petition offers little or nothing to support or explain the proposed changes to DD 99-01. We note that there is no support in the declaration for the proposed requirement that the Company bypass 60 percent mean annual unimpaired flows and that there has been no opportunity for the Company to cross-examine the declarant on what supports her recommendation. Further, a bypass of 60 percent of the mean annual flow represents a bypass of about 7 cfs. This is 28 times higher than DFG's previous recommendation. In addition, DFG misconstrues the 1997 SWRCB Russian River Report. The report was intended to provide guidance on the development of additional environmental documentation under CEQA for projects in the Russian River watershed. It did not propose summer bypass flows. The report cautions that projects that divert when stream flows are below 30 percent of the unimpaired flow during the summer are of concern and would need site specific evaluations under CEQA. This project is exempt from CEQA. The establishment of bypass terms requires a balancing of the public trust resources being protected and the diversion of water for beneficial uses on a case-by-case basis. The bypass term in DD 99-01 provides this balancing.

Regarding the other proposed changes to DD 99-01: Stream gauges are not necessary to measure visible flow. There is no support for limiting an unspecified permit term to 5 years. DD 99-01 already includes a term requiring the permittee to allow representatives of the SWRCB and other parties, as may be authorized by the SWRCB, reasonable access to the project works to determine compliance with the terms of the permit (see p. 16). The visible flow term is a diversion limit during low flow conditions. There is no support provided for unspecified mandatory water conservation measures.



3. DD 99-01 should not be modified as proposed by DFG in its petition.
4. DFG's petition for reconsideration should be denied.

### ORDER

IT IS HEREBY ORDERED, the petition for reconsideration of Division Decision 99-01 filed by DFG is denied.

### CERTIFICATION

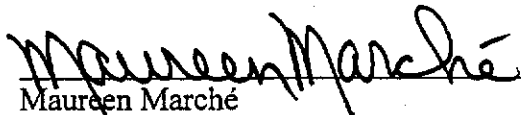
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 18, 1999.

AYE: James M. Stubchaer  
John W. Brown  
Arthur G. Baggett, Jr.

NO: None

ABSENT: Mary Jane Forster

ABSTAIN: None

  
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Maureen Marché  
Administrative Assistant to the Board

