

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

ORDER WR 2000 - 05

In the Matter of the Petitions for Reconsideration
of Division of Water Rights Decision 2000-01
Which Approved Application 29711 of Edward Bennett and Deborah Cahn,
Subject to Specified Conditions

Source: Unnamed Stream Tributary to the Navarro River
County: Mendocino

ORDER DENYING PETITIONS FOR RECONSIDERATION

1.0 INTRODUCTION

On February 18, 2000, the Chief of the Division of Water Rights (Division) issued Division Decision 2000-01 (DD 2000-01) which approved water right application 29711 of Edward Bennett and Deborah Cahn (Bennett/Cahn), subject to specified conditions. DD 2000-01 authorizes the applicants to divert to storage 30 acre-feet per annum (afa) from an unnamed intermittent stream tributary to another unnamed stream tributary to the Navarro River in Mendocino County. As part of its review of the application, the Division conducted a field investigation, and allowed the applicants and protestants to participate and present information, in accordance with the procedures for minor protested applications set forth in Water Code sections 1345-1348. On December 15, 1998, prior to the issuance of DD 2000-01, the Division issued a draft Division Decision on application 29711 and several other minor, protested applications in the Navarro River watershed. DD 2000-01 incorporates by reference most of the findings and analysis contained in the draft Division Decision.

Two parties submitted petitions for reconsideration of DD 2000-01: Dr. Hillary Adams, a protestant to application 29711, and Bob Baiocchi, representing the California Sportfishing Protection Alliance (CSPA), an interested party.

2.0 GROUNDS FOR RECONSIDERATION

A Division decision issued following a field investigation of a minor protested application is subject to review pursuant to Water Code section 1122. (Wat. Code, § 1347.) California Code of Regulations, title 23, 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.

Petitions for reconsideration must contain the following:

- (1) Name and address of the petitioner.
- (2) The specific board action of which petitioner requests reconsideration.
- (3) The date on which the order or decision was made by the board.
- (4) The reason the action was inappropriate or improper.
- (5) The specific action which petitioner requests.
- (6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

(Cal. Code Regs., title 23, § 769, subd. (a).) California Code of Regulations, title 23, section 769, subdivision (c) provides further that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition.

3.0 DR. HILLARY ADAMS'S PETITION

Dr. Adams alleges that the applicant's reservoir, which is an onstream reservoir, is capable of capturing all winter flows, that the Division did not consider the effect that the project will have downstream, and the Division did not consider the cumulative environmental impacts of the project. Dr. Adams also alleges that, if the SWRCB approves the application, the SWRCB will endanger coho salmon and steelhead trout. Finally, Dr. Adams alleges that the Division did not evaluate water availability as required by Water Code sections 1375, subdivision (d), 1243 and 1243.5.

Dr. Adams did not submit a statement of points and authorities in support of the legal issues raised in the petition as required by California Code of Regulations, Title 23, section 769, subdivision (c). Dr. Adams's petition should be denied for failure to comply with that procedural requirement.

In addition, Dr. Adams's general allegations lack merit. The Division performed a detailed analysis of application 29711 in accordance with the Water Code and the California Environmental Quality Act (CEQA). DD 2000-01 is supported by substantial evidence and does not contain error in law.

Water Code section 1375, subd. (d) requires the SWRCB to find that water is available for appropriation before issuing a permit. Water Code sections 1243 and 1243.5 require the SWRCB, in determining whether water is available, to consider the amount of water needed to remain in the stream for purposes of recreation, the preservation and enhancement of fish and wildlife, and the protection of beneficial uses. The Division performed the analysis required by the Water Code, and found that water was available for appropriation by the applicants, taking into account the instream flows needed to protect fishery resources and other beneficial uses. (DD 2000-01, pp. 1, 5-6, Draft Division Decision, Navarro River Watershed, Mendocino County, Pending Applications 29711, 29810, 29907, 29910 and 29911 (Dec. 15, 1998) pp. 8, 55, 57-59, 71-72.)

The Division developed permit terms and conditions in order to preserve the requisite instream flows, setting a minimum bypass flow of 0.1 cubic feet per second during the

December 15 through March 31 season of diversion, and requiring that all flows be bypassed throughout the rest of the year. Dr. Adams asserts that the applicants' reservoir is capable of capturing all winter flows. However, the Division did not authorize the applicants to divert all winter flows. The applicants must comply with a limited season of diversion, a bypass requirement, and a limit on the total amount that may be diverted per annum.

The Division complied with CEQA. The Division prepared an initial study, and concluded that, with specified permit terms and conditions, including those outlined above, the project would have less than significant impacts on the environment, including the riparian corridor and downstream fishery resources. After the applicants agreed to the terms and conditions, the Division prepared and circulated a mitigated negative declaration. As required by CEQA, the Division considered whether the impacts of the project would be considerable, when viewed against the backdrop of effects of other activities within the watershed. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 623-624 [49 Cal.Rptr.2d 494]; Draft Division Decision, *supra*, p. 71.) To the extent that Dr. Adams suggests that the Division failed to consider downstream or cumulative impacts, she is incorrect.

Finally, Dr. Adams has not provided any support for her allegation that approval of the application will endanger coho salmon and steelhead trout. Central California Coast Coho Salmon has been listed as threatened under the federal Endangered Species Act (ESA), and Northern California steelhead is a candidate for listing. (61 Fed.Reg. 56138-01; 50 C.F.R. § 227.4; 50 C.F.R. § 17.11; 63 Fed.Reg. 13347-02.) Both species are present in the Navarro River watershed. As a consequence, the Division placed special emphasis on the flows needed to protect coho and steelhead, and substantial evidence in the record supports the finding that sufficient water will remain in the stream to protect them. (See DD 2000-01, pp. 5-9; Draft Division Decision, pp. 10, 33-55, 65-68.) The Division sent copies of both the decision and the initial study to the National Marine

Fisheries Service (NMFS) for review and comment. NMFS staff indicated that they had inspected the project but elected not to comment on either document.

4.0 CSPA'S PETITION

In its petition, CSPA states that the SWRCB should comply with the federal ESA, and Fish and Game Code section 5937. CSPA asserts that the applicants should be required to consult with NMFS, and comply with any terms and conditions required by them. CSPA also states that issuance of a permit should be delayed until a CEQA document is prepared that analyzes the cumulative impacts to coho salmon and steelhead trout of the project and other pending water right applications. CSPA also supports Dr. Adams's petition.

Like Dr. Adams, CSPA did not submit a statement of points and authorities in support of the legal issues raised in its petition as required by California Code of Regulations, title 23, section 769, subdivision (c). In addition, CSPA's petition violates section 769, subdivision (a)(4) of the regulations because it fails to state the reason or reasons why DD 2000-01 was improper. For the most part, CSPA's petition merely states that the SWRCB should comply with applicable law, without alleging that the Division did not comply with the law, or explaining why CSPA believes the Division failed to comply. The petition also violates section 769, subdivision (a)(6) because it does not include a statement that the petition has been mailed to other interested parties. Instead, CSPA asked the SWRCB to distribute its petition because it had lost the mailing list. CSPA's petition should be denied for failure to comply with these procedural requirements.

DD 2000-01 is consistent with the federal ESA and Fish and Game Code section 5937. Briefly, under the ESA, the applicants may not "take" or "harm" a listed species. (See discussion in Draft Division Decision, p. 10.) Fish and Game Code section 5937 requires the owner of a dam to bypass sufficient water to keep fish below the dam in good condition. The Division addressed the requirements of the ESA and Fish and Game Code section 5937, and found that, with the permit terms and conditions specified, sufficient

water would remain in the stream to protect the downstream fishery. (DD 2000-01, pp. 1, 5-10; Draft Division Decision, pp. 10-11, 33-55, 65-68.) Substantial evidence in the record supports this finding. In addition, the Division emphasized the applicants' responsibility to comply with the ESA, and included a standard ESA term in the applicants' permit. (DD 2000-01, p. 11.) That term provides that the permit does not authorize any act that will result in the "take" of a listed species. If a "take" will result from any act otherwise authorized by the permit, the permittee must obtain incidental take authorization from NMFS as required under the ESA.

In light of the fact that the applicants' diversions will not impact fishery resources, the applicants should not be required to consult with NMFS, as requested by CSPA. Consistent with the standard ESA term, if at any point in the future the applicants have any question as to whether their diversions will result in a take of a protected species, the SWRCB expects that the applicants will contact NMFS (or the California Department of Fish and Game, if appropriate) and inquire whether incidental take authorization is required.

As for CSPA's claim that a CEQA document should be prepared that analyzes the cumulative impacts of the project and other pending water right applications, as explained in section 3.0, *supra*, the Division complied with CEQA. The Division prepared a mitigated negative declaration, and considered whether the impacts of the project would be considerable, when viewed against the backdrop of effects of other activities within the watershed.

5.0 CONCLUSION

In conclusion, Dr. Adams's petition should be denied for failure to comply with California Code of Regulations, title 23, section 769, subdivision (c). CSPA's petition should be denied for failure to comply with California Code of Regulations, title 23, section 769, subdivisions (a)(4) & (6), & (c). DD 2000-01 is supported by substantial evidence and does not contain an error in law. DD 2000-01 was appropriate and proper, and the petitions for reconsideration therefore should be denied.

IT IS HEREBY ORDERED:

The petitions for reconsideration of Dr. Hillary Adams and CSPA are denied.

CERTIFICATION

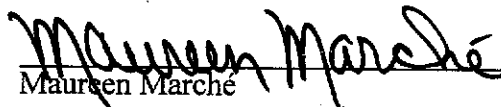
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 18, 2000.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown
Peter S. Silva

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board