

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0028-EXEC

In the Matter of the Petition for Reconsideration of Decision to not
Accept the Protest of Defenders of Wildlife filed against

TEMPLETON COMMUNITY SERVICES DISTRICT

Regarding Petition for Change of License 4829 (Application 13690)

SOURCE: Salinas River Underflow

COUNTY: San Luis Obispo

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

Defenders of Wildlife (Defenders) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) decision to deny its protest of Templeton Community Services District's (District) petition to add a new point of diversion to License 4829 (Application 13690). Although the subject line of the protest only refers to License 4829, the substance of the protest addresses both License 4829 and Permits 8964 and 20785 (Applications 12526 and 30299). The State Water Board Executive Director finds that the petition fails to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and denies Defenders' petition for reconsideration.

2.0 RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds: (1) irregularity in the proceedings or abuse of discretion; (2) the decision or order is not supported by substantial evidence; (3) there is relevant evidence,

which in the exercise of reasonable diligence, could not have been produced; or (4) an error in law. (Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (*Id.*, § 770, subd. (a)(1).)

Alternatively, after review of the record, the State Water Board also may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

State Water Board Resolution 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. The Executive Director's consideration of a petition for reconsideration falls within the scope of authority delegated under Resolution 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the order, or take other appropriate action.

3.0 FACTUAL BACKGROUND

On February 14, 2008, the District petitioned to add a new point of diversion to License 4829. The District concurrently petitioned to add the same point of diversion to Permits 8964 and 20785 (Applications 12526 and 30299). The District completed environmental review for the project in 2006 pursuant to the California Environmental Quality Act. The District concluded there were no adverse water resource related effects associated with the project because the diversion was from the Salinas River underflow and the project would involve adding a new point of diversion 2,100 feet from an existing point of diversion. The District circulated a Mitigated Negative Declaration, and the State Water Board and Department of Fish and Game (DFG) submitted comments. The District certified the Mitigated Negative Declaration on February 7, 2006.

The State Water Board publicly noticed the change petitions on May 15, 2008. On June 16, 2008, Defenders filed a timely protest to the District's change petition. Defenders alleged that the new well would be located on the lower Salinas River, which is habitat for the South-Central California Coast Steelhead Trout (Steelhead), and approving the change petition would have

adverse impacts to Steelhead. Defenders' allegation relied in part on a 2007 biological opinion from the National Marine Fisheries Service (NMFS) that was produced for the Salinas Valley Water Project in the lower Salinas River. The biological opinion concluded that groundwater extraction had decreased streamflow in the mainstem Salinas River and had negatively impacted habitat for threatened Steelhead. Defenders alleged that approval of the change petition would increase the capacity for diversions on an already impacted watershed and would adversely affect wildlife resources in contravention of Water Code section 1701.2, subdivision (c), which requires measures be taken for the protection of fish and wildlife in connection with any change.¹

On July 17, 2008, the Division dismissed Defenders' protest. The Division concluded that the change petition proposed no increase in allowable diversions and the District's petition to add the well was for the sole purpose of water supply reliability.

On August 15, 2008, Defenders submitted a timely petition for reconsideration of the Division's decision not to accept the protest.² Defenders argues that the District has not met its obligation to show that the proposed point of diversion will have no adverse impacts on the Steelhead fishery. Defenders asserts that "a proponent of any new groundwater well, whether a backup well or source for additional appropriation of water, should conduct a flow analysis to determine the hydrological connection between the proposed well and the mainstem Salinas River, including whether operation of the well would impact the remaining Steelhead..." Defenders restates its argument that the District has not complied with Water Code section 1701.2, which it alleges requires the District to consult with DFG regarding adverse affects to fish and wildlife that will result if the change petition is approved.

To help clarify Defenders' concerns, Division staff met with representatives from the District and from Defenders on September 29, 2008. The discussion did not resolve Defenders' concerns. Consequently, the Division provided Defenders an additional opportunity to submit information

¹ Water Code section 1701.2 (c) states that a petition for change must include information "...reasonably available to the petitioner, or that can be obtained from the Department of Fish and Game, concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change."

² The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a Petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

to support its claims. On November 15, 2008, the Division requested that Defenders' submit any additional information that it wished the State Water Board to consider in evaluating its petition for reconsideration. Defenders replied by letter on December 4, 2008, supplying no new information and repeating the claims it raised in its protest.

4.0 DISCUSSION

4.1 Grounds for Dismissal

Water Code section 1703.6 governs whether the State Water Board may properly dismiss a protest after requesting that the protestant submit specific information in support of the protest.³ Section 1703.6 (d) states that a protest, based on an allegation other than injury to a legal user of water, may be canceled if the Board determines that: 1) the public review period for the applicable environmental document has expired; and 2) in the absence of any additional information there is no substantial evidence in light of the whole record to support the allegation.

Because the public review period for the District's Mitigated Negative Declaration ended in 2006, in evaluating the protest the State Water Board will look to see if Defenders has submitted substantial evidence to support its protest.

4.2 Failure to Conduct a Flow Analysis

Defenders claims that the State Water Board misinterpreted and misstated the substance of its protest. Defenders asserts that it never claimed that overall appropriations would increase if the change petition is approved. Rather, Defenders claims that "a proponent of any new groundwater well, whether a backup well or a source for additional appropriation of water, should conduct a flow analysis to determine the hydrological connection between the proposed well and the mainstem Salinas River, including whether operation of the well would impact the remaining Steelhead within the South-Central California Steelhead ESU."

³ In its denial of Defenders' protest, the Division stated that the District's petition would not result in changes to the terms in the license regarding the maximum amount of water that the District could divert. In connection with the State Water Board's consideration of the petition for reconsideration, the State Water Board requested that the protestant provide any additional information that would support the petition, a request that effectively incorporates a request for any additional information contrary to the Division's conclusion.

In the context of the change petition, there is no basis for Defenders' request that a study is needed to show the connection between the new point of diversion and the Salinas River.⁴ The connection is already established. The District is not proposing a new appropriative right; rather it is shifting the point of its underflow diversions by 2,100 feet. The District's environmental review concluded that a 2,100-foot shift would not result in any adverse water resource impacts. Because Defenders does not challenge the location of the new well relative to existing wells, and the Division has no information suggesting that the new well location will have adverse water resource impacts, there is not substantial evidence to support Defenders' claim that a hydrologic study is necessary to ensure that the new well will not adversely impact fishery resources.

In reviewing a change petition, the State Water Board evaluates whether the change in diversion has the potential to change streamflows in a manner that adversely affects legal users of water or instream beneficial uses. Defenders appears to be arguing that, as a matter of law, a flow analysis should be required when a change involves a new well, whether or not the analysis is useful to evaluating how the change will affect streamflows. The Water Code and State Water Board regulations provide no basis for establishing such a legal requirement.

4.3 Failure to Consult under Water Code Section 1701.2

Defenders asserts that its protest is valid because the District should have consulted with the Department of Fish and Game (DFG) or sought data regarding the hydrologic connection between groundwater and surface water and the impact of the proposed well on Steelhead.

Contrary to Defenders' assertion, the District did consult with DFG in conjunction with its change petition. During the environmental review period for the project, the District submitted the Mitigated Negative Declaration to DFG. In its comments, DFG did not identify specific impacts that would result if the proposed point of diversion were approved. Instead DFG stated, "If the

⁴ The District noted in its change petition that it would construct a new groundwater well to operate in conjunction with its appropriations under License 4829, Permit 8964, and Permit 20785. While Defenders' protest refers to the District's groundwater well, it is unclear whether it is the operation of the groundwater well or the District's appropriative rights that concerns Defenders. Regardless, the change petition applies only to the proposed well that will divert Salinas River underflow. The change petition does not apply to the groundwater well since the Division does not have permit authority over groundwater diversions except where, as in the case of the District's permitted and licensed diversions from Salinas River underflow, the diversions are from a subterranean stream in known and definite channels. Defenders' protest can apply only to the District's underflow diversions—the appropriative water rights that are the subject of the change petition.

proposed new well will allow an increase in the amount of water above that currently being diverted from the Salinas River, then these additional diversions have the potential to adversely impact aquatic resources.”

The District also consulted with the Division during the environmental review period. In its comments, the Division notified the District that if the new diversion point would provide a means to increase diversions to the “full permitted quantity”, then it needed to analyze the incremental increase from existing diversions. The Division did not make a statement or finding as to whether the District was capable of currently extracting the full amount of its permitted and licensed water right. The Division stated only that if the new well would allow the District to divert more water, it would need to analyze the impacts of the increased diversions.

The only evidence the Division has to show the amount of water the District has diverted is in the District’s Progress Reports by Permittee, Reports of Licensee (progress reports) and statements provided in response to protest. The District’s progress reports show complete use under License 4829, and its use under Permits 8964 and 20785 is within 29 af of its maximum allowable use.

In its response to Division and DFG comments, the District stated that its current wells are capable of extracting its fully permitted allowance of 500 af. The District further stated that because its diversions are from river underflow, its environmental consultant had determined that any increase from the current 471 af to the fully licensed and permitted 500 af would cause no adverse environmental effects.

Neither DFG nor the Division responded to the District’s claims. While DFG’s silence cannot be construed as an admission that any increases in diversions would be insignificant, there is nevertheless no evidence in the record to support a claim that adverse impacts will result if the change petition is approved. Both DFG and Division comments expressed concern that a new well might allow increased water diversion. But the District’s claim that it has the capability to divert its entire permitted and licensed water allowance with existing wells has not been refuted. According to its yearly progress reports, the District has been incrementally increasing its usage under its water rights and has used 471 af of its 500 af allowance. Given no evidence to the contrary, it is reasonable to conclude that the District would be able to divert an additional 29 af with existing wells, and the new point of diversion will not allow increased water use.

Defenders concedes that the new well will not authorize an increase in the District's appropriations. Instead, Defenders argues that the new well increases the District's overall capacity to pump water from the Salinas River. Technically, this argument is correct: the District may be able to physically divert more water than it currently diverts by adding another well. But without evidence showing unauthorized diversions have occurred, or are likely to occur, the Division cannot assume that because an appropriator has the capability to divert more water than its license or permit allows, that it will exceed its permitted or licensed amount. The change petition does not allow an increase in water diversions; it allows the District to divert water in compliance with its appropriative limits at an additional point of diversion.

4.4 Defenders' Reliance on the NMFS Biological Opinion

Finally, Defenders claims that the NMFS biological opinion for the Salinas Valley Water Project supports its assertion that any additional pumping in the upper Salinas River Basin will adversely affect Steelhead. Defenders cites a passage from the biological opinion that addresses groundwater pumping in the lower Salinas River and its effect on flows in the mainstem Salinas River. The cited passage states that without adequate flows, "...steelhead cannot reach the upper tributaries, and groundwater pumping has shortened the period where adequate flows exist."

The biological opinion on which Defenders relies analyzed the lower Salinas River. The study area in the biological opinion is outside the area of the District's proposed pumping. Defenders does not dispute this point, rather it claims that the same principles apply to the upper reaches of the Salinas River. In its December 4, 2008 letter to the Division, Defenders claims the biological opinion supports the assertion that groundwater and underflow extraction in the upper Salinas River directly reduces streamflow.

The State Water Board does not dispute Defenders' assertion that groundwater pumping may affect streamflows and steelhead migration in the Salinas River. But Defenders' assertion that the biological opinion is "prima facie" evidence that the new point of diversion will have adverse environmental impacts is unsupported. We do not question whether there are significant threats to Steelhead in the study area of the biological opinion or that groundwater or underflow diversions on any stretch of the Salinas River affect streamflows and Steelhead habitat. However, the District's underlying right to divert 500 af from the Salinas River is not at issue, and the relevant inquiry for purposes of the State Water Board's review of the change petition is

what the impacts of the change will be, not the impacts of the District's diversions as authorized under the existing permits and license. Defenders' petition may be dismissed if there is no substantial evidence in the record to support Defenders' assertion that granting the District's change petition will adversely affect fish or wildlife resources. Defenders has not supplied such evidence.

5.0 CONCLUSION

The petition and all supplemental information submitted by Defenders fail to raise substantial issues related to the causes for reconsideration. Defenders has not presented any evidence linking the approval of a new point of diversion to adverse environmental effects. Accordingly, the State Water Board finds that petition fails to raise substantial issues related to the causes for reconsideration.

ORDER

IT IS HEREBY ORDERED that the Defenders of Wildlife petition for reconsideration is denied.

Dated: **APR 24 2009**



Dorothy Rice
Executive Director