

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0011-EXEC

In the Matter of Petition for Reconsideration of
THEODORE F. AND DIANE E. RICHARDSON LIVING TRUST
Regarding Order Rejecting Application 31923, and

RONALD AND LISA SUTTON
Regarding Order Rejecting Application 31924

ORDER GRANTING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

On February 1, 2012, Theodore F. and Diane E. Richardson Living Trust (Richardson) filed an application to appropriate water with the State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division). On February 2, 2012, Ronald and Lisa Sutton (Sutton) filed an application to appropriate water. Both applications sought to appropriate water from an Unnamed Stream tributary to Feliz Creek thence the Russian River, in Mendocino County. The Division assigned application number A031923 to the Richardson application and A031924 to the Sutton application.

The State Water Board's Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy), adopted May 4, 2010 (State Water Board Resolution No. 2010-0021), states that one year after adoption of the Policy, the State Water Board will not accept water rights applications for reservoirs built with onstream dams on class I or class II streams. By letter dated February 13, 2012, the Division provided notification to the applicants that the onstream dam(s) described in their applications may be on a class I or II stream, and thus the applications may be subject to rejection. On March 21, 2012, Division staff conducted a site visit to determine stream classification pursuant to the methods described in Policy Section A.1.6.1

Based on a review of the applications, information collected during the site visit, and information otherwise available to the Division, the Division determined that sufficient habitat indicators are present in the vicinity of the dams described in the applications to support an initial determination that the dams are on a class I or class II stream. On May 14, 2012, the Deputy Director for Water Rights issued decisions by letter rejecting Application 31923 of Richardson and Application 31924 of Sutton. Petitioners filed a petition dated June 13, 2012, requesting reconsideration of the decision to reject the applications. Petitioners dispute that the dam(s) are on a class I or II stream.

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of an order denying change and time extension petitions falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs. 1 23, § 768.) The legal bases for reconsideration are: (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; or (d) error in law.

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. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

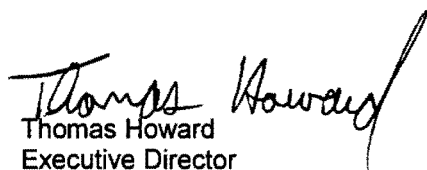
Considering that there appears to be a dispute as to whether the subject stream is a class I or II stream or a class III stream, which is relevant factor in whether an application can be accepted after the one-year deadline in the Policy, the Division's rejection of the application was premature. Division staff should have afforded the applicants an opportunity to either show, in the manner outlined in the Policy, that the subject stream is in fact a class III stream, or to apply for a case-by-case exception under the Policy.

Because Richardson and Sutton's petition for reconsideration is granted, there is no reason to address the other contentions raised in the petition at this time.

ORDER

IT IS ORDERED that the Richardson and Sutton petition for reconsideration of the May 14, 2012 Decision rejecting Application 31923 and Application 31924 is granted, and this matter is remanded to the Division for the processing of Applications 31923 and 31924 in accordance with the Policy. Such action may include offering the applicants the opportunity to retain an expert possessing the qualifications described in Section A.1.5 of the Policy to conduct a stream survey pursuant to Section A.1.6.2 of the Policy. Alternatively, if the applicant(s) concur with the Division's initial determination that the onstream dam(s) described in the application(s) are on a class I or class II stream, but wish to seek an exception from a provision of the Policy, the applicant(s) may request that the State Water Board accept the applications under the case by-case exception process described in Section 9.0 of the Policy.

STATE WATER RESOURCES CONTROL BOARD


Thomas Howard
Executive Director

Dated: **AUG 02 2012**