

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 15026)	ORDER: WR 90-11
on Application 5632 of)	
YUBA COUNTY WATER AGENCY,)	SOURCE: North Yuba, Yuba,
) Middle Yuba, and	Oregon Creek
) Petitioner.)	
_____)	COUNTY: Yuba, Nevada, Butte,
	and Sutter

ORDER AFFIRMING ORDER WR 90-8
AND DENYING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

The State Water Resources Control Board (Board) having adopted Order WR 90-8 on May 17, 1990, approving temporary changes in purpose of use and place of use; the Board having received a timely petition for reconsideration from California Sportfishing Protection Alliance (CSPA), the Bay Institute of San Francisco (BISF), and Pacific Coast Federation of Fishermen's Association (PCFFA), hereinafter referred to collectively as Objector; the Board having duly considered the issues set forth in the petition for reconsideration, the Board finds as follows:

2.0 GROUNDS FOR RECONSIDERATION

Section 768 of Title 23 of the California Code of Regulations lists four causes upon which a petition for reconsideration may be based:

- "(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."

Objector has not clearly explained which of these causes it is relying upon for its petition. A petition based in whole or in part on Section 768(c) must include an affidavit or declaration stating the nature of the evidence and why it was not presented. (See 23 Calif. Code of Regs. Section 769(b).) Since the petition is not accompanied by the supporting documentation, we conclude that the petition is not based on Section 768(c).

3.0

RELIEF REQUESTED

Objector requests that the Board rescind Order WR 90-8 and schedule a hearing on the temporary transfer petition. For the hearing, Objector requests that the Board require Yuba County Water Agency (YCWA), the Department of Water Resources (DWR), and the Department of Fish and Game (DFG) each to provide evidence showing that the proposed transfer will not unreasonably affect fish and wildlife or other instream beneficial uses.

Objector requests that the Board, after the hearing, find in writing that its order will not unreasonably affect fish and wildlife or other instream beneficial uses. Water Code Section 1725 et seq., under which we approved the temporary transfer, does not require a hearing unless the Board cannot, within 60 days after the petition is filed, make findings that (a) the proposed temporary change would not injure any legal user of the water, and (b) the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. We made such findings in Order WR 90-8, based on substantial evidence. Therefore, no reason now exists to hold a hearing.

Objector further requests that the report required by Order WR 89-17, condition 11 be included in the hearing record and sent to the interested parties. This request has been satisfied. YCWA submitted said report to the Board on May 31, 1990 and sent copies to several interested parties, including the representative of Objector.

Objector further requests that the Board develop rules and procedures for considering temporary transfers and trial transfers of water, including a definition of what constitutes an unreasonable or reasonable effect to fish and wildlife and other beneficial uses, before

approving any temporary or trial transfer of water. The Board is preparing amendments to its regulations for temporary transfers to take into account recent statutory amendments, but the Board has authority to approve a temporary change involving a temporary transfer under Water Code Section 1725 et seq. without amending its regulations. Further, nothing in the statute allows us to refuse timely consideration of temporary changes involving temporary transfers.

While Objector's request that the transfer be delayed for regulations defining reasonableness, such regulations are not necessary before the Board can carry out the statute. In Order WR 90-8 we determined that YCWA's temporary change is reasonable, based on all of the facts provided to us or known to us relevant to YCWA's particular proposal.

4.0

ALLEGED CAUSES FOR RECONSIDERATION

Objector listed six causes for reconsideration of Order WR 90-8. The sixth allegation generally alleges that the Board has violated various laws, and cites the actions described in the other five allegations.

Because it is dependent on the other allegations, the sixth allegation will not be discussed separately. The other five allegations are discussed individually below.

4.1

Time to Review Documents

Objector alleges that it was not given a copy of (1) the "draft Board Order WR 90-8 of May 17, 1990", (2) the "amended draft Board Order 90-8 of May 17, 1990", or (3) the "SWRCB Staff's Record of May 17, 1990 for Agenda Item No. 16" until the commencement of the 1:30 p.m. Board meeting at which the order was adopted on May 17, 1990. (The draft order was dated May 16, 1990, not May 17, 1990 as Objector apparently believes.)

- a. Although Objector alleges it first received a copy of the draft order at the start of the May 17, 1990 Board meeting, Objector's members could have picked up their copies on May 16, 1990. The Board's staff received telephone calls from Mr. Baiocchi and Mr. Kier, representing CSPA and BISF, on the afternoon of May 16, 1990, inquiring about getting copies of the draft order. Staff told them that they could pick up a copy of the draft order that afternoon, after 3:00 p.m. During the same afternoon, other interested parties called and likewise were told they could pick up copies of the draft after 3:00 p.m. Because of the length of the document, 47 pages, staff did not telecopy it to any party. Extra copies were placed in the

Division of Water Rights Executive Office and at the Division of Water Rights reception desk on May 16, and were available at those locations until the Board meeting on May 17. Objector alleges, in substance, that neither Mr. Baiocchi nor Mr. Kier picked up copies of the draft order until they arrived at the Board meeting. Other interested parties picked up copies on May 16, 1990.

- b. There was no "amended draft Board Order WR 90-8 of May 17, 1990". While the staff at the Board meeting on May 17, 1990 distributed a new draft of page 39 early in the meeting and orally recommended other changes at the end of the meeting before the Board adopted the order, no amended draft order was prepared or distributed. The differences between the draft order and Order WR 90-8 resulted from information provided by the parties at the Board meeting.

- c. Likewise, there was no "SWRCB Staff Record of May 17, 1990 for Agenda Item No. 16". Objector may be referring to the copies of backup documents that the Board's staff distributed at the beginning of the Board meeting. The backup documents were all the papers that had been filed specifically in connection with the petitioned temporary transfer.

The documents were stapled together with a cover page that was titled, "Index of Backup Documents for 1990 YCWA/DWR Transfer". These papers do not constitute the Board's record in this matter, were not titled to indicate that they were the administrative record, and should not be so construed. The administrative record in this matter consists of all of the documents contained in the Board's file on Application 5632. The file includes the materials received by the Board in connection with the 1987, 1988, 1989, and 1990 temporary changes requested by YCWA. In evaluating the current temporary transfer in Order WR 90-8, the Board referred to materials throughout the file.

Objector's representatives already had copies of most if not all of the backup documents before May 17, 1990. All of the documents were public records available to any member of the public at any time after the Board received them. Thus, Objector is plainly in error in complaining that it did not have time to review the backup documents.

Objector also complains that it did not have time to review the draft order and provide written comments. No requirement exists that a draft water right order be

circulated for written comments or reviewed by any party before it is adopted. Order WR 90-8 is a quasi-judicatory document. In the ordinary course of events, judicial decisions are not circulated for comment before they are adopted. No statute or regulation requires that draft water right orders and decisions be distributed in advance of a Board meeting. The Board currently as a matter of courtesy gives the parties an opportunity to see its water right decisions and orders in draft as soon as possible. In accordance with its usual practice, the Board gave Objector the opportunity to see the draft order as soon as it was completed, and as soon as any other party.

Objector claims that the Board's staff violated 23 Cal. Code of Regs. Section 647.2(b) by not providing copies of the draft earlier. Section 647.2(b) requires notice of Board meetings, including the agenda. It does not require distribution of draft orders. Objector members were given ample notice of the Board meeting and its agenda. The Board sent all interested parties a complete and adequate Board meeting agenda ten days before the Board meeting. The Board meeting agenda specified all of the matters required in a notice under Section 647.2(b). Additionally, the Chief of the Division of Water Rights sent the interested parties a letter dated May 4, 1990 telling them that the Board

would hold a meeting on May 17, 1990, and that the Board would adopt an order during the meeting if the required findings could be made. The letter explained the planned subjects for discussion, the issues of primary interest to the Board, and when the draft order would be released if it was available before the meeting. The result is that the Board more than complied with 23 Cal. Code of Regs. Section 647.2(b).

Well in advance of the Board meeting, Objector's members had full notice of the change proposed by YCWA. Consequently, Objector's members had adequate time to review YCWA's petition and the supporting documentation before the Board meeting. In a detailed notice dated April 26, 1990, the Chief of the Division of Water Rights notified the parties of the petition and its specifics, and required comments by 4:00 p.m. on May 10, 1990. The notice explained how to obtain copies of all backup documentation. All of the information used to prepare the draft order was available by May 10. Both BISF and CSPA filed written comments by May 10, 1990, which the Board considered in evaluating the proposed transfer. Thus, BISF and CSPA exercised their opportunity to make written comments at the time when such comments were most useful to the Board in evaluating the proposed transfer. At the same

time, they could have obtained copies of the other parties' submittals to prepare themselves for the Board meeting.

4.2 Opportunity to Comment at the Board Meeting

Objector complains that it was not given time to review and provide written comments on the "amended draft order"¹ before the Board adopted Order WR 90-8. As noted above, there was no amended draft order provided on May 17; rather, a replacement page for page 39 was circulated to the audience at the Board meeting. Further changes on page 39 and elsewhere in the order, recommended orally by the Chief of the Division of Water Rights as a result of the Board meeting, were included in the motion to adopt the order. Objector representatives were present during the oral recommendation and had a full opportunity to listen to it.

As noted in part 4.1, no requirement exists that adjudicatory decisions such as water right orders be made available for review or comment before they are adopted. Nevertheless, the draft of Order WR 90-8 was made available as soon as it was completed.

Consequently, Objector has no basis for complaining.

¹ At line 4 of Objector's alleged second cause of reconsideration, Objector refers to the "amended petition". Since YCWA did not amend its petition on May 17, 1990, we assume that Objector meant to say "amended draft order", referring to the replacement page for page 39 of the May 16 draft.

Further, Objector has not identified any specific cause for reconsideration in any of the changes made at the Board meeting. Instead, Objector is objecting to the fact changes were made. By itself, the fact that changes were made is not adequate as a cause for reconsideration.

4.3. Adequacy of the Evidence

Objector argues that the Board did not have adequate evidence to make the findings required by Water Code Section 1725 et seq. The basis of Objector's argument is the unfounded assumption that the only evidence before the Board was the backup documentation. As explained above, the Board had the entire file on Application 5632 before it when it adopted Order WR 90-8. The file was replete with documentation relevant to the issues, and was sufficient to make the findings. Order WR 90-8, at part 7.2, addresses the contention that the Board should have waited to receive a report containing data on the 1989 transfer. Such a delay would have eliminated some of the beneficial effects of the transfer on American shad. We incorporate by reference the discussion of this issue in Order WR 90-8.

In particular, Objector is concerned with the effect on fish and wildlife resources. Water Code Section 1727(a)(2) requires a finding that a proposed temporary change will not have an unreasonable effect on fish and wildlife and other instream beneficial uses.

Considering the entire circumstances of the current water year, we found that the temporary change will have no unreasonable effect on fish, wildlife, or other instream beneficial uses.

Objector apparently asserts that the Board's staff, in addition to the Board, was required to make the finding required by Water Code Section 1727(a)(2), regarding fish and wildlife. Objector is reading into the law provisions which do not exist.

4.4 Sunset Pumps Diversion

On May 17, 1990, CSPA speculated for the first time that the proposed transfer could have an adverse effect on American shad. This contention was discussed at the Board meeting, and a DWR representative explained that while the flows through the end of June in the Feather River below the Sunset Pumps would be at the 750 cfs minimum flow already required in DWR's water right permits, no higher flow would be present absent the transfer. Thus, any effect of the Sunset

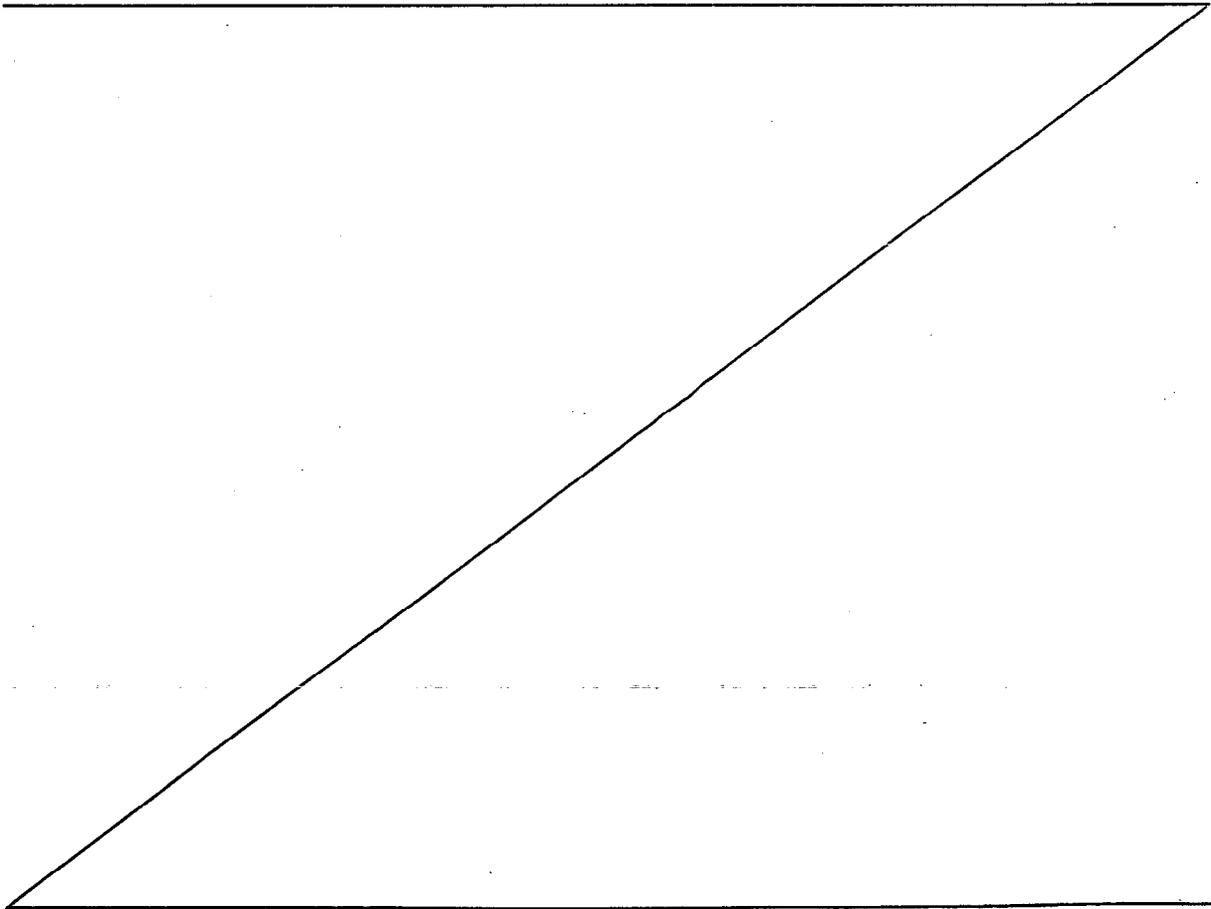
Pumps or of the minimum flow on the fishery would not be a result of the transfer.

Objector characterizes the absence of an analysis of the Sunset Pumps as defective hydrology. We disagree. Since the transfer has no effect on the downstream flow or on the diversion rate, no analysis is required in this case. This case is narrowly addressed to the effects of the temporary transfer, and not to other matters beyond the scope of the transfer.

4.5 Opportunity to Participate

Objector points out that the Board's staff met with representatives of several parties on May 17, 1990 before the Board meeting. Objector alleges its members were not present. Objector asserts that significant changes were made in the draft order as a result of the meeting, and that Objector had no opportunity to respond. Objector attributes more significance to the meeting than it had. While YCWA and DFG proposed several changes during the meeting with staff, staff made no changes in the draft order. All desired changes were presented to the Board for its consideration. The parties who wanted changes made their arguments to the Board during the meeting. While the staff provided a replacement page for page 39 for discussion, the replacement page was not the final

version of page 39. Thus, Objector's members had a full opportunity to hear all of the arguments and respond to them. In fact, Objector's members made extensive comments after the other parties had concluded their remarks. As a result of the Board meeting, the Board considered the points made by all of the interested parties and made the appropriate revisions at the end of the Board meeting in the motion to adopt the order. Objector heard everything that the Board members heard. Thus, Objector was not disadvantaged or injured in any way by its absence from the meeting with staff.



ORDER

IT IS ORDERED THAT Order WR 90-8 is affirmed and the petition for reconsideration is denied.

CERTIFICATION

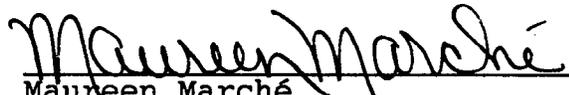
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 1, 1990.

AYE: W. Don Maughan
Darlene E. Ruiz
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board

