

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits)	ORDER:	WR 95-2
11308 and 11310)		
Issued Pursuant to)	SOURCE:	Santa Ynez River
(Applications 11331 and 11332),)		
of the UNITED STATES)	COUNTY:	Santa Barbara
BUREAU OF RECLAMATION,)		
Permittee)		
<hr/>			

ORDER DISMISSING PETITION FOR
RECONSIDERATION OF ORDER WR 94-5
BY CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

BY THE BOARD:

1.0 INTRODUCTION

The United States, Department of the Interior, Bureau of Reclamation (Bureau) owns and operates the Cachuma Project on the Santa Ynez River in Santa Barbara County, California. Water is diverted from the river at Bradbury Dam pursuant to water right permits 11308 and 11310 issued by the State Water Resources Control Board (SWRCB). On November 17, 1994, the SWRCB adopted Order WR 94-5 amending the water right permits held by the Bureau.

The order: (a) reserves jurisdiction to modify water right permits to protect downstream water right holders; (b) provides that the SWRCB will commence a hearing no later than December 1, 2000, an earlier hearing is possible if studies are not timely made or if studies are completed early; (c) requires preparation of environmental studies and an analysis of the effect of the Cachuma project on downstream diverters; and (d) requires water to be released for fishery studies. On December 16, 1994, the California Sportfishing Protection Alliance (CSPA) filed a petition requesting that Order WR 94-5 be reconsidered.

2.0 PETITION FOR RECONSIDERATION

CSPA contends that when adopting Order WR 94-5 the SWRCB should have required that water be bypassed or released from Bradbury Dam to keep any fish which may exist below the dam in good condition. In support of this contention, the petitioner contends that the SWRCB has a legal duty under Fish and Game Code Section 5937 to require dam operators to bypass or release sufficient water to keep any fish which may exist below dams in good condition. Section 5937 provides in part:

"The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam"

In other words, the petitioner is contending that the SWRCB should have addressed other or additional matters beyond those addressed by Order WR 94-5. The petition requests that Order WR 94-5 be amended by placing a mandatory daily flow requirement in the Bureau's permits for the bypass or release of water at Bradbury Dam.

3.0 LAW APPLICABLE TO PETITIONS FOR RECONSIDERATION

Petitions for reconsideration of orders or decisions must be:

(a) filed within 30 days following adoption and (b) accepted or denied within 90 of adoption. (Water Code Section 1357.)

Reconsideration may be sought for the following causes:

1. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
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; and,

4. Error in law.¹ (Title 23, Cal. Code Reg., Section 768.)

Among other matters, petitions for reconsideration must include a statement that copies of the petition and any accompanying materials have been sent to all interested parties. (Title 23, Cal. Code Reg., Section 769(a)(6).) In addition, the petition must be accompanied by a statement of points and authorities in support of legal issues raised in the petition. Title 23, Cal. Code Reg., Section 769(c).)

The SWRCB may refuse to reconsider a decision or order if the petition fails to raise substantial issues. In addition, after review of the record the SWRCB may (a) deny a petition upon finding that a decision or order was appropriate, (b) set aside or modify the decision or order, or (c) take other appropriate action. (Title 23, Cal. Code Reg., Section 770.)

4.0 PETITIONER FAILED TO COMPLY WITH PROCEDURAL REQUIREMENTS

Based upon the SWRCB's list of persons receiving a copy of Order WR 94-5, about forty-two persons were interested in the adoption of the order. Some of these persons were representatives of the same parties. The papers submitted by the petitioner did not include a statement that copies of the petition were sent to other interested parties as required by Section 769. Further, the petition was not accompanied by a declaration of service or other papers indicating that other interested parties were provided a copy of the petition. Finally, the administrative record does not include any papers filed in response to CSPA's petition for reconsideration.

The purpose of Section 469(a)(6) is to provide notice of the petition to other interested parties so that they can determine what action, if any, should be taken to protect their interests.

¹ Petitioner seeks reconsideration only on the grounds that an error of law occurred when Order WR 94-5 was adopted.

Petitioner's failure to provide a copy of the petition to other interested parties has denied them a fair opportunity to respond to the petition and the due process to which they are entitled. Petitioner's failure to satisfy the notice requirements of Section 769(a)(6) is grounds for dismissal of the petition.

5.0 SECTION 5937 DOES NOT IMPOSE A NON-DISCRETIONARY DUTY ON THE SWRCB TO REQUIRE DAM OPERATORS, WHO HOLD WATER RIGHT PERMITS OR LICENSES, TO PASS SUFFICIENT WATER TO KEEP FISH IN GOOD CONDITION²

CSPA contends that the SWRCB has a legal duty under Section 5937 to require dam operators to bypass or release sufficient water to keep any fish which may exist below an existing dam in good condition. While the SWRCB has authority to require dam operators to make sufficient releases to maintain fish in good condition, the SWRCB is not under any non-discretionary duty in this case to require the Bureau to comply with Section 5937.³ Section 5937 states, in part, that "[t]he owner of any dam shall allow sufficient water at all times to pass" (Emphasis added.) By its terms, Section 5937 does not impose a duty on the SWRCB; the section imposes a duty on the dam owner -- in this case the Bureau.

² The papers submitted by the petitioner did not include points and authorities, as required by Section 769(c), in support of the contention that the SWRCB has a legal duty to impose Section 5937 on the permits for the Cachuma Project.

³ No decision of California appellate courts has concluded that this section imposes a duty on the SWRCB to require every dam operator who holds a water right permit or license to pass sufficient water to keep fish in good condition. In California Trout, Inc. v. Superior Court of Sacramento (1990) 218 Cal.App.3d 187, 266 Cal.Rptr. 788, the Court of Appeal held that the SWRCB had a duty to impose the requirements of Section 5937 on permits held by the Los Angeles Department of Water and Power for diverting water from tributaries to Mono Lake; however, the requirement was made mandatory due to Fish and Game Code Section 5946 and not to Section 5937. Section 5946 provides, in part: "[n]o permit or license to appropriate water in District 4½ shall be issued by the State Water Rights Board after September 9, 1953, unless conditioned upon full compliance with Section 5937." Section 5946 is not applicable to the Santa Ynez River in Santa Barbara County.

The legal duty of the SWRCB is one of continuing supervision over the diversion and use of water to apply the requirements of the public trust and reasonableness doctrines. In carrying out its duty of continuing supervision, the SWRCB must be cognizant of the legislative policy set by Section 5937. In the absence of a non-discretionary duty to apply Section 5937, however, the SWRCB cannot set instream flows without first obtaining the information needed to evaluate the efficacy of instream flows for the maintenance of fish and the effect of such flows on project beneficiaries. Finally, the SWRCB is not authorized to set instream flow requirements for fish without first providing the Bureau with notice and opportunity for a hearing.

5.1 The Requirements of Section 5937 Apply to the Bureau

The Bureau holds legal title to the water right permits for the operation of the Cachuma Project. Federal water projects in California constructed under the Federal Reclamation Act are subject to the requirements of Section 5937. (NRDC v. Patterson (1992) 791 F.Supp. 1425.) The Cachuma Project is a project authorized under Federal Reclamation Act. (On March 4, 1948, the Secretary of the Interior authorized the Cachuma Project pursuant to Section 9(a) of the Federal Reclamation Act of 1939, 43 U.S.C. Section 485h(a), House Document 387, 80th Congress, 2d Session.) Thus, the operation of the Cachuma Project is subject to the requirements of Section 5937.

5.2 The SWRCB Has Continuing Authority Over Water Right Permits for the Cachuma Project to Adopt Conditions to Protect Fish

Under the public trust doctrine the State retains supervisory control over navigable waters and the lands beneath those waters, as well as non-navigable waters that support a fishery. (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419; 189 Cal.Rptr. 346, 357.) In addition, under the reasonableness doctrine the State retains continuing authority over the manner in which water is diverted and used under water right permits and licenses. (Water Code Section 275, California Constitution,

Article X, Section 2; In re Water of Hallet Creek Stream System (1988) 44 Cal.3d 448; 243 Cal. Rptr. 887, 901, note 16.) Based on these authorities, the SWRCB has continuing authority under the public trust doctrine and the reasonableness doctrine. Conditions are included in the Bureau's permits for the Cachuma Project expressly reserving continuing authority under these doctrines.

Section 5937 is a legislative expression of the public trust doctrine. (California Trout, Inc. v. State Water Resources Control Board (1989) 207 Cal.App. 585, 255 Cal.Rptr. 184, 209, 212.) It is the policy of the SWRCB to implement Section 5937.⁴ Section 5937 and 5946 of the Fish and Game Code have been construed together as a legislative determination of reasonableness which imposes mandatory enforcement obligations on the SWRCB. (California Trout, Inc. v. State Water Resources Control Board (1989) 207 Cal.App. 585, 255 Cal.Rptr. 184, 208.) No appellate law exists construing Section 5937 alone; however, California Trout, Inc. can be read as indicating that Section 5937 legislatively establishes that it is reasonable to release enough water below any dam to keep any fish that exist below the dam in good condition. Nevertheless, a release of water that is much in excess of that needed to keep fish in good condition could be unreasonable under California Constitution Article X, Section 2, if there would be adverse effects on other beneficial users of water.

5.3 The Circumstances Where the SWRCB Has a Non-Discretionary Duty to Apply Section 5937 Are Not Applicable Here

The SWRCB has a non-discretionary duty to apply Section 5937 in either of two cases. First, as noted above, the SWRCB has a non-discretionary duty in cases subject to Section 5946. (California Trout, Inc. v. Superior Ct. (1990) 218 Cal.App. 3d 187; 266 Cal.Rptr. 788.) Section 5496 applies only in Fish and Game

⁴ See Title 23, Cal. Code Reg., Section 782.

District 4½ (Mono and Inyo Counties), and does not apply to this case. Second, as required by SWRCB regulations, the SWRCB must include a condition requiring compliance with Section 5937 in any permit issued after 1975.

In 1975, the SWRCB adopted a regulation which subjects new applicants for the appropriation of water to the requirements of Section 5937. The section is currently found in Title 23, Cal. Adm. Code at Section 782. The section provides, in part, that

"... all permits for diversion of water from a stream by means of a dam which does not contain a more specific provision for the protection of fish shall require the permittee to allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam;"

The Attorney General has opined that this Section 782 does not apply to persons who have already obtained a water right permit. (57 Ops. Cal. Atty. Gen. 577, 580 (1974).) The permits issued for the Cachuma Project were approved during 1958, when the SWRCB adopted Decision 886. Thus, Section 782 came into being about 17 years after the issuance of water right permits for the project.

5.4 SWRCB Orders Providing Instream Flow for Fish Below Existing Dams Must be Based Upon Substantial Evidence Obtained During an Evidentiary Hearing

In the absence of any non-discretionary duty requiring the SWRCB to amend permit or license, there must be an opportunity for a hearing before the SWRCB enters an order requiring a permittee or licensee to forego the diversion and use of water or to bypass flows entering its reservoir. The Water Code does not authorize the SWRCB to enter orders analogous to temporary or preliminary injunctions prior to an evidentiary hearing. SWRCB orders establishing or modifying conditions in permits must be supported

by substantial evidence in an administrative record. (Bank of America, NTS&C v. SWRCB (1974) 42 Cal.App. 3d 198, 208, 116 Cal.Rptr. 770, 775.) The existing administrative record does not contain information which would enable the SWRCB to make a meaningful evaluation of the issues necessary to support an order requiring the by-pass or release of water below Bradbury Dam.⁵

During 1990, the SWRCB noticed and commenced a hearing for the Santa Ynez River. Among the matters noticed for hearing was petitioner's complaint which contended that releases should be made from the Cachuma Project in accordance with Section 5937. Key issues noticed for the hearing included those issues which must be evaluated to require the by-pass or release of water below Bradbury Dam. The parties were required to submit their testimony and exhibits to the SWRCB in writing in advance of the hearing. After three days the hearing was discontinued when it became apparent that essential factual data, including environmental data and documentation, were not available.

One purpose of Order WR 94-5 is to require studies and the preparation of documents which may enable a hearing to be held with a reasonable expectation that necessary information will be available to the SWRCB to evaluate whether and to what extent the Cachuma Project should bypass or release water for fish below Bradbury Dam. For instance Order WR 94-5 requires that the permittee: (a) release water for fishery studies and (b) prepare environmental studies and an analysis of the effect of the Cachuma project on downstream diverters. In addition, it must be noted that the petitioner has not indicated that it is prepared to make the evidentiary showing necessary to support its request for a mandatory daily flow requirement in the Bureau's permits for the bypass or release of water at Bradbury Dam.

⁵ See Tit. 23, Cal. Code Reg., Section 784(c) for some of the issues which must be evaluated.

6.0 CONCLUSION

Having considered the foregoing we find that the petitioner failed to: (1) comply with procedural requirements and denied other interested parties a fair opportunity to respond to the petition and the due process to which they are entitled, (2) submit points and authorities in support of the alleged error in law, which was the sole basis for the petition, and (3) raise a substantial legal issue appropriate for granting reconsideration. Thus, we find that adoption of Order WR 94-5 is appropriate and that the petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration of Order WR 94-5 by the California Sportfishing Protection Alliance is denied.

CERTIFICATION

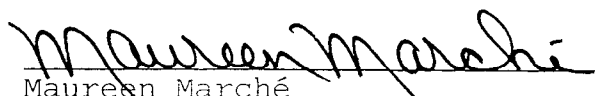
The undersigned, Administrative Assistant to the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board on February 1, 1995.

AYE: John Caffrey
James M. Stubchaer
Marc Del Piero
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant
to the Board

