

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications)
24239, 24245, 24246, 27386,)
and 27477,)

CITY OF MORRO BAY,)

Applicant,)

VIVIAN ROEMER AND JOHN JONES,)
COASTAL SAN LUIS RESOURCE)
CONSERVATION DISTRICT,)
CALIFORNIA COASTAL COMMISSION,)
NAGANO CO., DAVID WIXOM,)
RON KENNEDY,)

Protestants,)

CALIFORNIA DEPARTMENT OF FISH)
AND GAME, ADVOCATES FOR A)
BETTER COMMUNITY, CENTRAL)
COAST REGIONAL WATER QUALITY)
CONTROL BOARD, CALIFORNIA)
DEPARTMENT OF PARKS AND)
RECREATION, CALIFORNIA)
DEPARTMENT OF CORRECTIONS--)
CALIFORNIA MEN'S COLONY,)
FRIENDS OF THE ESTUARY,)
CALIFORNIA SPORTSFISHING)
PROTECTION ALLIANCE,)

Interested Parties.)

ORDER: WR 95-16

SOURCES: Chorro Creek
Subterranean Stream
tributary to
Morro Bay thence
Pacific Ocean and
Morro Creek
Subterranean Stream
tributary to
Morro Bay thence
Pacific Ocean

COUNTY: San Luis Obispo

ORDER DENYING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 BACKGROUND

On July 20, 1995, the State Water Resources Control Board (SWRCB) adopted Water Rights Decision 1633 approving the issuance of permits to the City of Morro Bay (City) subject to specified conditions. On August 17, 1995, the City filed a timely petition for reconsideration (petition) of Decision 1633. The City seeks reconsideration based upon an error in law and new evidence which

was not available at the time of the close of the hearing record. The City seeks reconsideration of permit condition 5b on the grounds that the City's Environmental Impact Report (EIR) should be treated as admissible evidence on issues relevant to condition 5b.¹ More specifically, the City requests that certain information which is contained in the hydrogeology report prepared by Converse Consultants as an appendix to the EIR regarding the existence of clay layers and the interconnection of surface and ground water not be treated as hearsay evidence.

Section 768 of Title 23 of the California Code of Regulations authorizes reconsideration based 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."

Requirements for petitions for reconsideration are set forth in Section 769 of Title 23 of the California Code of Regulations. Section 769 states:

¹ Condition 5b of Decision 1633 states:

"For the protection of fish and wildlife habitat and other public trust resources in Chorro Creek and Morro Bay, beginning when deliveries are available from the State Water Project Permittee shall:

* * *

"Cease all diversions from Wells 9, 9A, 10, 10A, 12 and 16 (Ashurst well field), or from any wells constructed or operated as replacement wells for the Ashurst well field, whenever surface flow measured in Chorro Creek downstream of the Ashurst well field is less than 1.4 cubic feet per second."

" (a) Any petition for reconsideration of a decision or order shall be submitted in writing and shall 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.

" (b) If reconsideration is requested based in whole or in part on Section 768(c), the petition shall include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented. A general statement of the nature of the evidence and of the facts to be proved shall also be included.

" (c) The petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition."

2.0 STATUS OF THE CITY'S EIR IN THESE PROCEEDINGS

The City alleges that the SWRCB treated the hydrogeology report in the EIR as hearsay evidence. In fact, the SWRCB did not rule that the EIR was hearsay evidence and gave the report the same weight as would have been given if the SWRCB had determined that the EIR would be admissible over objection in a civil action. The City's final EIR, including the hydrogeology report, was admitted into evidence without objection during the SWRCB's 1987 hearing on the City's applications which are the subject of Decision 1633. The EIR was identified as Staff Exhibit 10. The SWRCB considered the EIR pursuant to its duty as a responsible

agency under the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000, et seq.).²

Regarding the subject of depletion effects on surface flows in Chorro Creek caused by the City's extraction of ground water, the SWRCB found that the EIR was not as credible as other contradictory expert testimony. In doing so, the SWRCB concurred with Mr. Hunt, attorney for the City, who stated at the 1995 hearing that the EIR has been discredited (T95II, 139:24-140:1).

The SWRCB found the testimony of Mr. Timothy Cleath, the City's witness at the 1995 hearing, to be persuasive regarding the subject of depletion effects on surface flows in Chorro Creek caused by the City's extraction of ground water. Mr. Cleath concluded that the Ashurst well field will have less of an impact on surface flow in Chorro Creek than the upstream Romero well field. Mr. Cleath was unable to provide a precise location of the clay beds and could not definitively state that the vertical percolation of surface water into the aquifer was impeded in the Ashurst well field area. Further, Mr. William Boucher, Public Works Director of the City of Morro Bay, testified that the City is considering conducting a stream depletion study of the Ashurst well field. Because the evidence is not conclusive regarding the quantitative stream depletion effects caused by pumping the Ashurst well field, the SWRCB adopted condition 6³ in

² As noted on page 41 of Decision 1633, the SWRCB considered the City's EIR in deciding whether to approve the City's applications and in deciding the specific conditions to be included in the permits issued to the City.

³ Condition 6 states:

"Permittee may, at its option, seek a waiver of term 5b by conducting a study and providing the Chief, Division of Water Rights, with quantitative evidence that ground water extraction from the Ashurst well field does not deplete surface flow in Chorro Creek. The evidence shall be provided in a report which also specifies the reach of the creek and portion of the alluvial aquifer studied and a description and justification of the methodology used to measure stream depletion. The State Water
(continued...)"

Decision 1633 which would authorize the waiver of condition 5b if the City is able to provide quantitative evidence that ground water extraction from the Ashurst well field does not deplete surface flow in Chorro Creek.

SWRCB regulations allow admission of hearsay evidence, so long as it is relevant and the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Calif. Code of Regs., Tit. 23, Sections 648.4(a) and 761(d).) Although the SWRCB must consider any properly admitted hearsay evidence, hearsay evidence is not sufficient in itself to support a finding unless that hearsay evidence would be admissible over objection in a civil action. (Id. Sections 648.4(d) and 761(d).) In this proceeding, no party has made an objection that the EIR is hearsay. The SWRCB has made no determination whether the EIR is hearsay or whether the EIR would fit any of the exceptions which allow admission of certain kinds of evidence even if they are hearsay. (See generally Evid. Code Section 1220 et seq.) The SWRCB considered the EIR but decided not to rely on the hydrogeology report because the SWRCB found the report to be unpersuasive. The SWRCB did not treat the EIR as hearsay evidence. Because no party objected, and because the SWRCB found other evidence more persuasive than the hydrogeology report, the SWRCB had no need to determine whether any evidentiary rule would otherwise limit the SWRCB's use of the report.

3.0 NEW EVIDENCE OFFERED BY THE CITY

The City alleges that it has relevant evidence, which in the exercise of reasonable diligence, could not have been produced

³(...continued)

Resources Control Board reserves jurisdiction over this permit to determine whether to waive term 5b. Any action to waive term 5b shall be taken only after notice to interested parties and opportunity for hearing."

during the hearings on the City's applications. In its petition, the City states:

"[R]elevant evidence is being submitted with this Petition which bears on the admissibility of the EIR. We are providing the Board with a declaration of a principle [sic] consultant in the preparation of the Converse Consultant's report. The individual is a qualified expert on issues related to ground water hydrology. His testimony will be submitted to the Board in declaration form with an attached curriculum vitae. If called upon to testify at the hearings on this matter he would have testified consistently with his declaration and taken the positions as asserted in the Converse Consultant's report which is an appendix to Staff Exhibit 10." (Petition, p. 3.)

The City's supporting declaration was received by the SWRCB on August 29, 1995.

The City offers no explanation regarding why it failed to call this witness to authenticate the report and testify on the subject of the clay layers. This is not new evidence nor does the City explain why, in the exercise of reasonable diligence, such evidence could not have been produced during the 1987 or 1995 hearings.

Moreover, a claim that the City has new evidence which bears on the admissibility of the EIR does not raise any substantial issue which might justify reconsideration. The EIR was submitted as an SWRCB staff exhibit, admitted into evidence, and considered by the SWRCB as required under CEQA. Any additional evidence bearing on the admissibility of the EIR would have been cumulative. The testimony of the consultant would have obviated any hearsay objection, but no party has made such an objection and, as explained in Part 2.0 of this order, the SWRCB gave the EIR the same weight as if the evidence had been determined to be admissible over objection in court.

4.0 THE CITY WAS GIVEN DUE PROCESS DURING THE SWRCB'S PROCEEDINGS

In its Memorandum of Points and Authorities in support of its petition, the City alleges that it "has been denied due process by not being given any notice that its principle [sic] evidence on the issue of the impermeable clay layer at the Ashurst field would not be accepted to prove the truth of the matter asserted." Like the City's other arguments, this argument erroneously assumes that the SWRCB determined that the EIR was inadmissible hearsay, and either ignored or discounted the EIR on that basis. As discussed above, the SWRCB admitted the EIR into evidence and considered it for the truth of the matter asserted, giving it the same weight as if it had been determined to be admissible in court. As an adjudicatory fact finder, the SWRCB is entitled to use reasonable judgment when deciding the evidentiary weight to be given to conflicting testimony and exhibits. In this instance, the SWRCB gave more weight to the testimony of Dr. John Mann and Mr. Timothy Cleath than to the information contained in the EIR. The SWRCB decision turned on the weight given conflicting evidence and not on whether information contained in the EIR is or is not hearsay evidence.

5.0 CONCLUSION

The SWRCB considered the City's EIR and made no finding that it or any other evidence constituted hearsay. The SWRCB finds that the City's allegation that it has new evidence that could not have been presented during either the 1987 or the 1995 hearing lacks merit. The City offers no reasonable explanation for its failure to call as a witness the individual who prepared the hydrogeology report for Converse Consultants which was included

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in the EIR. The SWRCB finds that the City was given due process during these proceedings and that there is no error in law. Therefore, the City's petition should be denied.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition for reconsideration filed by the City of Morro Bay 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 September 21, 1995.

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

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board