

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001 - 01

In the Matter of the Petition for Extension of Time
of the City of San Luis Obispo
Permit 5882 (Application 10216)

SOURCE: Salinas River

COUNTY: San Luis Obispo

ORDER DENYING RECONSIDERATION OF ORDER WR 2000-13

1.0 INTRODUCTION

The California Sportfishing Protection Alliance (CSPA) seeks reconsideration of the State Water Resources Control Board's (SWRCB) Order WR 2000-13, adopted October 19, 2000, which conditionally approved the City of San Luis Obispo's (San Luis Obispo) petition for extension of time to complete beneficial use of water and construction of the Salinas Reservoir expansion project.

San Luis Obispo and the United States Army Corps of Engineers are co-permittees under Permit 5882, which authorizes the collection to storage of 45,000 acre-feet per annum (AFA) in the Salinas Reservoir. The Salinas Reservoir was originally constructed with this storage capacity, but storage historically has been limited to approximately 23,000 acre-feet because the dam's spillway gate was never installed due to seismic concerns.

In 1991 San Luis Obispo filed a petition for extension of time to complete beneficial use of water and construction work under Permit 5882. CSPA protested the petition on the basis that the existing diversion and storage of water under Permit 5882 and the proposed additional storage of water may result in adverse impacts on fish and wildlife resources.

On October 12, 13, and 18, 1999, the SWRCB held a hearing and received evidence concerning San Luis Obispo's petition for extension of time and the unresolved protest issues. The City of El Paso de Robles (Paso Robles) also presented evidence at the hearing. The SWRCB held the record open after the hearing solely to receive the parties' written closing and reply briefs, which were submitted on December 20, 1999, and January 10, 2000. After considering the evidence in the hearing record and the arguments of the parties, the SWRCB adopted Order WR 2000-13 finding that there was good cause to approve San Luis Obispo's petition and to grant the city a 10-year extension of time under Permit 5882. CSPA timely petitioned for reconsideration of the SWRCB's decision.

After considering CSPA's petition for reconsideration in light of the entire record, the applicable law, and its findings in Order WR 2000-13, the SWRCB concludes that its decision in Order WR 2000-13 was appropriate and proper. The petition is denied. (Cal. Code Regs., tit. 23, § 770, subd. (a)(2)(A).)

2.0 GROUNDS FOR RECONSIDERATION

The SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB upon petition by any interested person. (Wat. Code, § 1122.) California Code of Regulations, title 23, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:¹

- (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.

¹ All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

The SWRCB 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.

(§ 770, subd. (a)(1).) Alternatively, after review of the record, the SWRCB also may deny the petition if the SWRCB 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. (§ 770, subd. (a)(2)(A)-(C).)

3.0 CSPA'S PETITION FOR RECONSIDERATION

This order addresses the principal issues raised by CSPA. To the extent that this order does not address all of the issues raised in CSPA's petition for reconsideration, the SWRCB finds that either these issues are insubstantial or have already been adequately addressed by the SWRCB's Order WR 2000-13, or that CSPA has failed meet the requirements for a petition for reconsideration under the SWRCB's regulations. (§§ 768-769.)

3.1 The SWRCB Has Complied With Its Duties As A Responsible Agency Under The California Environmental Quality Act In Considering The Petition For Extension Of Time

CSPA raises a number of issues concerning the SWRCB's obligations as a responsible agency and the adequacy of the environmental documentation under the California Environmental Quality Act (CEQA). The primary thesis of CSPA's petition is that the SWRCB should require the preparation of a subsequent Environmental Impact Report (EIR) for the reservoir expansion project in light of seismic safety information that became available after the hearing record closed.²

CSPA first contends that additional evidence is available that could not have been produced at the hearing and requests that Volumes I and II of the Salinas Reservoir Expansion Project Dam Safety Evaluation Report (Dam Safety Report), dated June 28, 2000, be made part of the record

² In its petition for reconsideration, CSPA requests that a supplemental EIR be prepared, but relies on CEQA Guideline section 15162, which governs the preparation of *subsequent* EIRs. (Cal. Code Regs., tit. 14, § 15162.) For this reason, and because CSPA fails to analyze the requirements applicable to a supplemental EIR, this order will not address the preparation of a supplemental EIR. Instead, the SWRCB will presume that CSPA meant to refer to a subsequent EIR instead of a supplemental EIR.

of this proceeding. According to the declaration of Lorraine Scarpace (attorney for CSPA) attached to CSPA's petition for reconsideration, CSPA maintains that the Dam Safety Report is relevant to CSPA's request "to require the City of San Luis Obispo to prepare a supplemental EIR on the seismic safety of the proposed project." The SWRCB previously considered this request when CSPA submitted these volumes to the SWRCB in August 2000 as part of CSPA's Motion to Require Petitioner to Prepare a Supplemental EIR. The Hearing Officer denied CSPA's motion by letter dated October 10, 2000. The SWRCB denied in Order WR 2000-13 a similar request by Paso Robles to reopen the hearing record. CSPA does not allege that the SWRCB's decision not to accept the documents into evidence was improper or otherwise in error, and the SWRCB will not revisit the issue.

Although CSPA does not expressly identify the other grounds for reconsideration under section 768 on which it relies, CSPA asserts that the SWRCB has violated its duty under CEQA. Apparently CSPA believes that the SWRCB's failure to require San Luis Obispo to prepare a subsequent EIR is based on an error in law. CSPA, however, neither cites any authority nor provides any analysis to support its contention that a responsible agency can compel a lead agency to prepare a subsequent EIR.³

The information relied on by CSPA as the basis for its argument that a subsequent EIR is required was available before San Luis Obispo, the lead agency, approved the project.⁴ Accordingly, any argument that a subsequent EIR was required should have been directed to the lead agency. If an interested person believes a subsequent EIR is required and the lead agency approves the project without preparing a subsequent EIR, that person's recourse under CEQA is

³ CSPA may claim that it intended to request the SWRCB to prepare a subsequent EIR, but at no time did CSPA make this request in the petition. At best, the petition merely states that a subsequent EIR is required without identifying who should prepare the document. In submitting a petition for reconsideration, it is incumbent on the petitioner to identify, *inter alia*, the reasons the SWRCB's action is inappropriate or improper, the grounds for reconsideration, and the specific action that the petitioner requests. (§§ 768, 769.) The SWRCB will not make petitioner's arguments for it.

⁴ The SWRCB takes official notice of the fact that on November 13, 2000, San Luis Obispo filed a Notice of Determination with the State Clearinghouse, which advised that the city had approved the project on November 9, 2000. (§ 648.2.)

to file an action in court challenging the lead agency's approval. (See Pub. Resources Code § 21167, subd. (c).) If no timely action is filed challenging the lead agency's decision to approve the project without preparing a subsequent EIR, and unless new information requiring preparation of a subsequent EIR becomes available after the statute of limitations has run on any challenges to the lead agency's approval, the EIR is conclusively presumed to be adequate. (*Id.* § 21167.2, see *id.* § 21166.)

San Luis Obispo did not identify any potentially significant impacts relating to dam safety in its Final EIR. The request for a subsequent EIR is premised on CSPA's belief that the Dam Safety Report identifies a new significant impact requiring consideration of alternatives or the adoption of mitigation measures. In Order WR 2000-13, the SWRCB required San Luis Obispo to inform the SWRCB's Division of Water Rights (Division) of any changes made to the final EIR. San Luis Obispo has not apprised the Division of any changes and there is no evidence in the record to support CSPA's contention that the Dam Safety Report identifies as-yet-unaddressed significant impacts.

In keeping with the SWRCB's authority to condition approvals in the public interest and to ensure the public safety, the SWRCB also included in Order WR 2000-13 a condition requiring San Luis Obispo to obtain approval of any final dam design from the Department of Water Resources, Division of Dam Safety (DSOD). Thus, San Luis Obispo cannot build the dam without obtaining approval from DSOD. Although CSPA asserts that this condition is inadequate, the basis for CSPA's contention is unclear. The Legislature has entrusted DSOD with the regulation and supervision of dams, and CSPA proffers no reason why the SWRCB should not defer to DSOD's expertise. (See Wat. Code, § 6025 et seq.)

CSPA also argues that the Final EIR is inadequate and thus, *inter alia*, a subsequent EIR is required to provide additional information concerning mitigation measures. As discussed in section 8.4.1 of Order WR 2000-13, the SWRCB does not have the authority to make a determination concerning the legal adequacy of the City's EIR. CSPA does not suggest or explain how the SWRCB's conclusion about the extent of its authority as a responsible agency under CEQA was erroneous.

Further, CSPA requests that the SWRCB amend the order to require San Luis Obispo to acquire only certain types of replacement habitat as mitigation for upstream environmental impacts. In justifying this request, CSPA alleges that San Luis Obispo has approved the purchase of inappropriate replacement habitat. CSPA's contention, however, is not based on evidence in the hearing record. Moreover, Order WR 2000-13 already requires San Luis Obispo to develop and present to the SWRCB detailed mitigation plans for review and approval prior to construction of the project. The SWRCB also required San Luis Obispo to submit any alternative mitigation measures to the SWRCB for review and approval prior to construction. Thus, the SWRCB will have an opportunity to review the planned mitigation and finds that is unnecessary to impose additional requirements in its order.

3.2 The SWRCB's Approval Of The Petition For Extension Of Time Is Supported By Substantial Evidence And Is In Accordance With The Law

CSPA contends that substantial evidence does not support the SWRCB's conclusion that San Luis Obispo has exercised due diligence and that the conclusion is contrary to law. Based on a review of substantial evidence in the record, the SWRCB finds that its decision to grant an extension of time is appropriate and in accordance with the law.

The SWRCB's regulations allow an extension of time to be granted only on such conditions as the SWRCB determines to be in the public interest, and on a showing to the SWRCB's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (§ 844.) In Order WR 2000-13, the SWRCB considered the evidence supporting each element necessary for the approval of an extension of time, and concluded that there was good cause to grant the extension. To assert, as CSPA does, that the evidence shows that San Luis Obispo failed to make any significant progress on the Salinas Reservoir project until 1992, is to ignore substantial evidence identified and relied on by the SWRCB in Order WR 2000-13.

Next, CSPA maintains that the reservoir expansion is a new project requiring a new water right permit, citing *California Trout, Inc. v. State Water Resources Control Board (California Trout)* (1989) 207 Cal.App.3d 585 [255 Cal.Rptr. 184]. The SWRCB considered and rejected this analysis of *California Trout* in section 7.0 of Order WR 2000-13. CSPA does not proffer any

additional analysis or identify any error in law that would require the SWRCB to revisit this issue.

CSPA further contends that San Luis Obispo has failed to obtain a permit to enlarge the dam as required by Water Code section 6200. Section 6200 requires the owner of a dam to obtain written approval of plans and specifications from the Department of Water Resources before enlarging the dam. A new permit is required, CSPA maintains, because Permit 5882 limits the dam's spillway height. This argument is flawed for several reasons. First, compliance with section 6200 is not prerequisite to a finding of due diligence. (See, e.g., Cal. Code Regs., tit. 23, § 844.) Second, Permit 5882 contains no limitation on spillway height. (See, e.g., Paso Robles Exhibit 25.) The reference to spillway height that CSPA identifies is contained in San Luis Obispo's application to appropriate water (Application 10216). Permit 5882, which authorizes the storage of 45,000 AFA, does not preclude modification of the dam design to achieve that storage.

Similarly, CSPA's contention that San Luis Obispo's petition for extension of time should be denied pursuant to section 840 of the SWRCB's regulations, is misguided. Section 840, which governs the SWRCB's denial of applications to appropriate water, is inapplicable in this proceeding because San Luis Obispo has already applied for, and received, a water right permit.

CSPA also argues that the SWRCB should deny the extension of time because the proposed reservoir expansion violates prior vested downstream rights, exceeds San Luis Obispo's appropriative water rights under Permit 5882 and constitutes an unreasonable use and diversion of water. Order WR 2000-13, however, does not sanction the appropriation of water exceeding the amount authorized under Permit 5882. Permit 5882 continues to be subject to prior downstream rights, and to ensure that the project would not adversely affect downstream water users, Order 2000-13 prohibits operation of the reservoir in a manner that contributes to increased overdraft of the Paso Robles Groundwater Basin. CSPA's arguments on these points are unfounded and unpersuasive.

3.3 The SWRCB's Approval Of The Extension Of Time Is In Accordance With The Public Trust Doctrine And Other Applicable Environmental Laws

CSPA asserts that the SWRCB should deny the petition for extension of time because the extension and the resulting reservoir expansion will violate the public trust, state and federal Endangered Species Acts, and California Constitution article X, section 2. Based on the evidence in the record, and pursuant to its continuing authority under the public trust doctrine, in Order WR 2000-13 the SWRCB required San Luis Obispo to conduct studies to determine the occurrence of steelhead and the suitability of steelhead habitat between Highway 58 and the Salinas Dam. The SWRCB also required compliance with all applicable provisions of the state and federal Endangered Species Acts. CSPA's argument that the SWRCB's approval of the extension of time violates the aforementioned laws is unpersuasive.

CSPA maintains that the SWRCB has a duty to impose immediate interim mandatory daily streamflows to maintain steelhead and other aquatic resources below the Salinas Dam in good condition. The SWRCB previously addressed this contention in section 8.4.3.5 of Order WR 2000-13. Briefly, the SWRCB cannot establish interim flows without giving the co-permittees notice and an opportunity for hearing. The scope of this hearing was limited to consideration of the time extension petition and the impacts related to any approval of the petition, namely, the impacts associated with the reservoir expansion project and not those impacts associated with the operation of the existing reservoir. CSPA is aware that other fora and procedures are available to address its concerns about the impacts of the existing reservoir, including filing a public trust complaint. (R.T. pp. 301-302.)

In addition, CSPA requests the SWRCB to amend the Order to require San Luis Obispo to take the following actions: (1) complete the fishery and habitat studies within one to two years from adoption of the order; (2) conduct the fishery studies under the close supervision and coordination of the National Marine Fisheries Service (NMFS) and the Department of Fish and Game (DFG) because San Luis Obispo has an interest in the outcome of the studies; and (3) study critical habitat in the watershed below the Salinas Dam (specifically the five miles of the Salinas River canyon below Highway 58, and the tributaries to the Salinas River). These proposed requirements are neither required by law nor supported by substantial evidence in the record.

First, Order WR 2000-13 requires San Luis Obispo to complete the fishery studies prior to construction. A specific time constraint on the required studies is not appropriate, since the studies must be conducted under appropriate environmental conditions. For example, in very dry years, flows may be inadequate to attract adult steelhead or to stimulate outmigration by juvenile fish. Therefore, it would be impossible to determine whether fish actually use these areas or whether spawning and rearing habitat may develop in wetter years. The requirement to complete the studies prior to construction is both adequate and appropriate to provide the necessary flexibility to obtain the best information.

Second, Order 2000-13 requires the city to submit a plan for the fishery study to the Chief, Division of Water Rights (Division Chief) for approval. In approving the plan, Order WR 2000-13 does not prohibit the Division Chief from soliciting comments from other resource agencies or requiring coordination with Division staff in the field. CSPA does not explain why additional oversight is necessary or cite to any authority that would allow the SWRCB to require DFG or NMFS to supervise and coordinate the fishery studies.

Third, the parties' testimony regarding the suitability of steelhead habitat primarily addressed the reach of the Salinas River between the dam and Highway 58. The SWRCB did not find substantial evidence in the record, and CSPA has not identified such evidence in its petition, that would warrant study of the reach below Highway 58.

CSPA contends that the SWRCB should amend Order 2000-13 to require steelhead habitat studies in the canyon reach below the Salinas Dam, and to require stream flow studies. Order WR 2000-13 requires San Luis Obispo to conduct studies to ascertain the occurrence of steelhead and to evaluate the adequacy of the habitat in the canyon reach. Subject to the Division Chief's review of these studies, and determination that additional study is warranted, the order requires San Luis Obispo to conduct a geomorphologic study of the canyon reach to identify stream flows necessary to maintain the river channel. CSPA does not identify either additional habitat studies that should be required or substantial evidence in the record that would warrant geomorphologic studies to determine stream flows at this time.

Finally, CSPA requests several amendments to Order WR 2000-13 without alleging how the SWRCB's decision was inappropriate or improper, as required under section 769, subdivision

(a)(4), and without identifying substantial evidence in the record that would support such amendments. The SWRCB will not consider these proposed amendments further.

4.0 CONCLUSION

Based on the foregoing, the SWRCB finds that its determination in Order WR 2000-13 was appropriate and proper. CSPA's petition for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED that CSPA's petition for reconsideration is denied.

CERTIFICATION

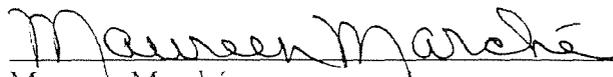
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 10, 2001.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown
Peter S. Silva

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board