

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2005-0006-EXEC

In the Matter of the
PETITION OF REDWOOD VALLEY WATER DISTRICT
Either to Modify, Revoke, and/or Stay Order WR 2005-0001-DWR
or for Reconsideration of Order WR 2005-0001-DWR Issued to
Mendocino County Russian River Flood Control and Water Conservation District.

ORDER DENYING PETITION

BY THE EXECUTIVE DIRECTOR¹

1.0. INTRODUCTION

By letter dated January 20, 2005, Redwood Valley Water District (Redwood) filed a petition with the State Water Resources Control Board (State Water Board) seeking to modify, revoke, or stay Order WR 2005-0001-DWR; or, in the alternative, to reconsider the order. Order WR 2005-0001-DWR is a final cease and desist order against Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino). The Chief of the State Water Board's Division of Water Rights (Division) notified Mendocino on October 26, 2004 of the Division's intent to issue cease and desist order No. 262.31-12 against Mendocino. The Chief of the Division (Chief) provided notice to Redwood of the Division's intent to issue cease and desist order No. 262.31-11 against Redwood on the same day. Both Redwood and Mendocino requested hearings, and the State Water Board scheduled a hearing to consider both draft orders on February 9, 2005. On December 30, 2004, after negotiations with Enforcement Team of the State Water Board, Mendocino agreed to accept a revised cease and desist order and to waive its right to a hearing. By letter dated December 31, 2004, the Enforcement Team notified the State Water Board's hearing staff that it agreed with the revised draft cease and

¹ SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the SWRCB. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the SWRCB, the Executive Director's consideration of petitions for reconsideration falls within the scope of the authority delegated under Resolution No. 2002-0104. Accordingly, the Executive Director has the authority to deny a petition for reconsideration or set aside or modify the action of the Division.

desist order that Mendocino had offered and recommended that the Chief issue the revised draft cease and desist order. On January 7, 2005, the Chief withdrew proposed cease and desist order No. 262.31-12 and issued Order WR 2005-0001-DWR.

2.0 THE PETITION

The State Water Board may order reconsideration on all or a part of a decision adopted by the State Water Board upon petition by any interested person. (Wat. Code § 1122.) The State Water Board's regulation lists the following causes upon which a petition for reconsideration may be filed:

“(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.”

(Cal. Code Regs., tit. 23, § 768.)

This order addresses the principal issues raised by Redwood. To the extent that this order does not raise all of the issues Redwood has raised, the State Water Board finds that either these issues are unsubstantial or that Redwood has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (Cal. Code Regs., tit. 23, §§ 768-769.)

Redwood styles its petition first as a petition to modify, revoke, or stay Order WR 2005-0001-DWR under Water Code section 1832, and in the alternative as a petition for reconsideration under Water Code section 1122. Water Code section 1832 provides that the State Water Board may, upon receipt of an application from an aggrieved person, modify, revoke, or stay in whole or in part any cease and desist order. No procedures are provided in Water Code section 1832, and no regulations provide a distinct process. In practical effect, the procedure is in the regulations governing a petition for reconsideration. The provisions for

reconsideration are applicable to any decision or order issued under, among other provisions, all of Part 2 of Division 2 of the Water Code, which includes the issuance of cease and desist orders. (Wat. Code, § 1120.) Accordingly, all of the actions available under Water Code section 1832 that Redwood seeks in its first alternative are available under a petition for reconsideration, and Redwood's petition will be considered as a petition for reconsideration. (Cal. Code Regs., tit. 23, § 770.)

2.1 Substance of the Petition for Reconsideration

Although Redwood does not specify its cause of reconsideration with reference to the regulations, it can be assumed that Redwood's intention is to base its petition on the cause of reconsideration listed in Government Code section 768(a) of the regulations, quoted above. Redwood argues that it was prejudiced by the issuance of Order WR 2005-0001-DWR because it did not have an opportunity either to comment on the discussions between Mendocino and the Enforcement Team or to comment on the Order before it was issued. Redwood makes several arguments.

2.1.1 Redwood Is Not a Party to the Mendocino Cease and Desist Order

Redwood argues that it is a "party" to the cease and desist order against Mendocino because the State Water Board issued a hearing notice that included both the Redwood and the Mendocino cease and desist orders. Based on the premise that it is a "party" to the proceeding on the Mendocino cease and desist order, Redwood reasons that there cannot be a decision by settlement under Government Code section 11415.60 unless there is agreement by all of the parties.² Accordingly, Redwood argues that the Division was precluded from "reaching

² The issuance of a cease and desist order is delegated to the Chief when no hearing is requested. (SWRCB Resolution No. 2002-0106, paragraph 2.8.1.) In this case, Mendocino had waived its right to a hearing, meaning that no hearing was requested at the time. Accordingly, the Chief was authorized to issue the Order. It should be noted, however, that another provision, in Resolution No. 2002-0104, delegates the authority to adopt a "decision or order by settlement of the parties" under Government Code section 11415.60 to the Executive Director. Order WR 2005-0001-DWR fits the technical definition of a decision by settlement, and therefore arguably could be adopted by the Executive Director, but the Chief of the Division of Water Rights has been more specifically delegated authority to adopt this particular type of order.

agreement”³ with Mendocino alone. As the following points demonstrate, Redwood has not established that it was a party to Proposed Cease and Desist Order No. 262.31-12 when the Enforcement Team and Mendocino reached agreement and proposed the revised cease and desist order. Accordingly, Redwood’s participation in the negotiations between the Enforcement Team and Mendocino was not required.

The Chief issued two separate proposed cease and desist orders on October 26, 2004, one to Redwood and one to Mendocino. While the two proposed orders address related factual circumstances, they are separate proposed orders. A proposed cease and desist order serves as the initial pleading against the person to which the agency action is directed.⁴ Neither the proposed order issued to Mendocino nor Order WR 2005-0001-DWR directs Redwood to do anything. Accordingly, Redwood was not automatically a party in Proposed Cease and Desist Order No. 262.31-12.

Redwood in effect argues that the attachment to the hearing notice, titled “Information Concerning Appearance at Water Right Hearings” made Redwood a party to proposed cease and desist order No. 262.31-12 by stating generally that, “[t]he parties are Mendocino County Russian River Flood Control & Water Conservation Improvement District, Redwood Valley County Water District, the Division of Water Rights’ Enforcement Team, and any other persons or entities authorized by the hearing officer to participate in the hearing as parties.” This provision does not, however, constitute a ruling by the hearing officer that Redwood was a party in the proposed cease and desist order against Mendocino. Nor is there any other basis for holding that Redwood is a party.

Redwood points out that Government Code section 11405.60 defines a “party” to include the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding. Redwood then

³ To the extent that there was an agreement, the agreement was between the Enforcement Team and Mendocino, not between the Chief and Mendocino. The agreement was evidenced by the separate recommendations of both parties that the Chief adopt the revised cease and desist order.

⁴ Because it precedes any request for a hearing, a proposed cease and desist order is issued before any adjudicative proceeding exists.

claims that the hearing notice gave it permission to participate as a party in the proceeding against Mendocino. The State Water Board's hearings are governed by its regulations and to the extent specified in the regulations, by the provisions of chapter 4.5 of the Administrative Procedure Act and other laws.⁵ The State Water Board's regulations provide a slightly different definition of a "party" than Redwood cites in Government Code section 11405.60. Under the State Water Board's definition at California Code of Regulations, title 23, section 648.1, subdivision (a), a party is the person to whom the action is directed and any other person whom the Board determines should be designated as a party. This section also provides that the hearing notice may specify a procedure for designation of parties. The hearing notice issued on December 17, 2004, specifies that the hearing officer will decide who can participate in the hearing as a party. During the pendency of the proceeding against Mendocino, Redwood did not seek or obtain a hearing officer ruling to allow it to participate as a party with regard to the proposed cease and desist order against Mendocino.

Subdivision (b) of California Code of Regulations, title 23, section 648.1, specifies the parties in a water right hearing. The categories of parties include an applicant or petitioner, protestants, persons objecting to a temporary change, persons who have filed an unresolved written complaint with the Board concerning the subject matter of the hearing, and any other persons designated in accordance with the procedure in the hearing notice. Redwood does not come under any of these categories.

The State Water Board's administrative act of setting both of the cease and desist orders for one hearing was not the functional equivalent of consolidating two cases in court as a single case, but was in the nature of a coordination of two cases to be heard together for the convenience of the State Water Board and the parties to the two proceedings. It contained no ruling by a hearing officer authorizing Mendocino and Redwood each to be a party in the other's cease and desist order proceeding.

⁵ The applicable Water Code provisions and the State Water Board's regulations prevail over any conflicting or inconsistent provision in the Government Code. (Gov. Code, § 11415.20.)

2.1.2 The Chief's Alleged Consultation With a Hearing Officer Regarding the Revised Draft Cease and Desist Order Was Not a Prohibited Ex Parte Communication

Redwood alleges that the Chief consulted with Hearing Officer Katz prior to executing Order WR 2005-0001-DWR. Redwood argues that such consultation violates the State Water Board rules regarding *ex parte* communications, the State Water Board's policy, and the Administrative Procedure Act provisions. Redwood does not fully explain why it believes there is a violation, but simply cites generally to Government Code sections 11430.10, et seq., and more specifically to Government Code section 11430.80, and cites to page 1, paragraph 2 of an April 17, 2001, memorandum from the Board's Chief Counsel, which is attached to the petition for reconsideration.

The Chief Counsel's memorandum summarizes the legal constraints on *ex parte* communications between Board members and persons who have an interest in an adjudicative proceeding before the Board. As the memo points out in footnote 1, "Communications with staff members are not covered in this memo, but may be restricted in limited situations based on separation of function principles (e.g., where staff act as advocates before the boards)." As footnote 1 further states, an off-record communication with a staff member who is assisting the Board is not a prohibited *ex parte* communication. On the other hand, an off-record communication with a staff member who is serving as an advocate is prohibited. In this case, the Enforcement Team is composed of the staff members who are serving as advocates in this proceeding. No member of the Enforcement Team is alleged to have communicated with Board members about the Mendocino cease and desist order, however.

Hearing Officer Katz, like Hearing Officer Silva, is a member of the State Water Board. Redwood is asserting that the Chief's communication with a Board member regarding the revised draft cease and desist order was a prohibited *ex parte* communication. The Chief, however, is delegated authority by the State Water Board to adopt a final cease and desist order in lieu of having the State Water Board adopt the order itself. The Chief, therefore, does not serve as an advocate, but instead acts on behalf of the Board as the decision maker. The fact that the Chief issues preliminary determinations on proposed cease and desist orders during a pre-adjudicative stage does not change this conclusion. (*See* Gov. Code, §§ 11425.30(b)(2); 11425.10(a)(4).)

The Government Code sections addressing *ex parte* communications are designed to cover a multitude of agencies with varying structures. As a result, they may seem internally inconsistent at first glance. In many cases the presiding officer in an adjudicative hearing is an employee of the agency or an employee of another agency, not the agency head, and these varying situations are the cause of the special-circumstance rules that appear in Government Code sections 11430.70 and 11430.80. When the presiding officer is a member of the agency head, as is the case with the State Water Board, the rule in Government Code section 11425.80, subdivision (a), that Redwood relies upon does not apply. (See Gov. Code, § 11425.80, subd. (b).)⁶ The Law Revision Commission Comments published in the Annotated Code explain that Government Code section 11430.80 is a special application of a provision of former Government Code section 11513.5(a), which precluded a presiding officer from communicating with a person who presided in an earlier phase of the proceeding. Government Code section 11430.80, subdivision (a), extends the *ex parte* communications limit to include communications between an agency head and a presiding officer. The purpose of this limit is to enforce a general principle that the presiding officer should not be an advocate for the proposed decision to the agency head, including a person to whom the power to act is delegated. As the Law Revision Commission points out, however, this limitation does not apply if the presiding officer merely prepares a recommended decision for the decision maker and does not issue a decision to the parties. Likewise, as explicitly stated in Government Code section 11430.80, subdivision (b), this limitation does not apply where the agency head or other person or body who is delegated the authority to decide serves as both presiding officer and agency head.

In this case, the Chief is delegated the authority to decide whether to issue a final cease and desist order, and therefore is acting on behalf of the State Water Board. A discussion between a member of the agency head who is also a presiding officer and the decision making delegate of the agency head is not a prohibited *ex parte* communication under the Government Code. The

⁶ Government Code section 11430.80, subd. (b), provides: “This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.”

Chief is part of the Hearing Team, not part of the Enforcement Team. Accordingly, there has been no prohibited *ex parte* communication that could be prejudicial to Redwood.

2.1.3 Redwood Is Not Prejudiced by Order WR 2005-0001-DWR

Redwood cites some factual findings in Order WR 2005-0001-DWR that it claims are prejudicial to it. Because it is not a party to the enforcement action against Mendocino,⁷ Redwood has no standing under the enforcement action against Mendocino to challenge these findings, and cannot claim to be prejudiced in that proceeding. These findings are about Mendocino's water rights, not Redwood's, and Redwood is not a party to the order. Further, these findings are not binding on Redwood, since they are not directed to Redwood.

If Redwood can demonstrate that evidence about Mendocino's water rights is relevant to whether or not the proposed cease and desist order against Redwood should be adopted, Redwood may be able to present evidence at the hearing Redwood has requested regarding the factual issues it now asserts as being prejudicial to it. Any such presentation of evidence will be dependent on compliance with the rules for presentation of evidence attached to the hearing notice and other applicable laws and regulations. The evidence Redwood presents must be relevant to the cease and desist order against Redwood, however.

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⁷ Under California Code of Regulations, title 23, section 648.1(b), a person who has filed an unresolved complaint against the responding party with the State Water Board concerning the subject of the hearing is included as a party. Redwood has not filed any written complaint against Mendocino. Accordingly, this method of establishing standing in the cease and desist order is not available to Redwood, and Redwood meets none of the other criteria for being a party in that proceeding.

3.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that the adoption of Order WR 2005-0001-DWR by the Chief of the Division of Water Rights was appropriate and proper, and that the petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration is denied.

Dated: February 3, 2005

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director