

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-0013-EXEC

In the Matter of the Petitions for Reconsideration of
LORRI W. LOCKWOOD
AND
CAROLYN H. MOTZEL

Regarding Division Decision 2010-02
Approving Application A030946 of Clear Ridge Mutual Water Association
and Issuing Permit 21272

ORDER DENYING THE PETITIONS FOR RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

On December 6, 2010, the Deputy Director for the Division of Water Rights (Division) issued Division Decision 2010-02 (Decision), which conditionally approved Application A030946 of Clear Ridge Mutual Water Company (Clear Ridge) and issued Permit 21272. Ms. Lorri W. Lockwood and Dr. Carolyn H. Motzel² individually petitioned for reconsideration of the Decision. By this order, the State Water Resources Control Board (State Water Board) denies the two petitions.

Clear Ridge serves 42 properties located on Pfeiffer Ridge and Clear Ridge in the Big Sur area of Monterey County. Permit 21272 authorizes Clear Ridge to appropriate up to 42 acre-feet

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to conduct and supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of an order approving a change petition falls within the scope of the authority delegated under Resolution No. 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the order, or take other appropriate action. The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedure Act. (State Water Board Order WR 96-1, at p. 17, fn. 11.)

² Dr. Motzel's attorney-in-fact, Mr. Werner Motzel, Jr., petitioned for reconsideration on behalf of Dr. Motzel.

per year from the subterranean flow of the Big Sur River for domestic and fire protection purposes. As part of its review of the application, the Division prepared an Initial Study and Mitigated Negative Declaration pursuant to the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq. The Division also conducted a field investigation of the project and allowed the applicant and protestants to participate and present information regarding the project at the investigation. The Decision was based on a review of all available information, including an evaluation of the hydrologic characteristics of the water sources for the project, the availability of water to supply the proposed project, the beneficial uses of the proposed water diversion, the protestants' claims, the potential impacts on prior water rights and public trust resources, the information contained in the Initial Study and Mitigated Negative Declaration, and information gathered during the field investigation.

In general, Ms. Lockwood and Dr. Motzel each allege that the Decision is not supported by substantial evidence. I find that the petitions fail to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and deny the petitions for reconsideration. The Division's Decision was appropriate and proper.

2.0 GROUNDS FOR RECONSIDERATION

Any person interested in any application, permit, or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs., tit. 23, § 768.)³ The bases for reconsideration are: (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. (*Ibid.*)

Petitions for reconsideration must 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 State Water Board.
- (4) The reason the action was inappropriate or improper.
- (5) The specific action which petitioner requests.

³ Unless otherwise indicated, all further regulatory references are to title 23 of the California Code of Regulations.

(6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

(§ 769, subd. (a).) Section 769, subdivision (c), further provides that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition.

The State Water Board 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 of the board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the board 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.⁴ (*Id.*, subd. (a)(2)(A)-(C).)

3.0 MS. LOCKWOOD'S PETITION

A petition for reconsideration of a decision or order shall contain certain information, including the date on which the order or decision was made by the State Water Board (§ 769, subd. (a)(3)), and a statement of points and authorities in support of the legal issues raised in the petition (*id.*, subd. (c)). If reconsideration is requested based in whole or in part on a claim that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced (§ 768, subd. (c)), then the petition shall include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the State Water 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. (§ 769, subd. (b).)

Ms. Lockwood did not submit the information above as required by section 769 of the regulations. Ms. Lockwood's petition is denied for failure to comply with these procedural requirements.⁵

⁴ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

⁵ The regulations also require a petition for reconsideration to contain a "statement that copies of the petition and any accompanying materials have been sent to all interested parties." (§ 769, subd. (a)(6).) Although Ms. Lockwood did not include such a statement in the petition, she copied interested parties on her correspondence.

In addition, Ms. Lockwood's allegations lack merit. Ms. Lockwood asserts that the Decision is not supported by substantial evidence because Clear Ridge did not prepare an Environmental Impact Report and did not employ a registered hydrologist or geologist. Ms. Lockwood also alleges that there is "further reasonable evidence" that was not considered, namely the Big Sur River Protected Waterway Management Plan and various provisions preventing the transfer of water to another watershed.⁶ She further contends that Clear Ridge's use is inconsistent with its easement and is expanding without proper local and state permitting.

The allegations raised by Ms. Lockwood in her petition are almost identical to the allegations she raised prior to issuance of the Decision. The Division addressed Ms. Lockwood's allegations in the Decision, and it is unnecessary to address them again in detail in this order. Accordingly, a brief discussion of the allegations and a general discussion of the Division analysis supporting the Decision follows.

The Division performed a detailed analysis of Application A030946 in accordance with the Water Code and CEQA. Water Code section 1375, subdivision (d), requires the State Water Board to find that water is available for appropriation before issuing a permit. Water Code sections 1243 and 1243.5 require the State Water Board, in determining whether water is available for appropriation, to consider the amount of water needed to remain in the stream for purposes of recreation, the preservation and enhancement of fish and wildlife, and the protection of beneficial uses. The Division performed these analyses and other analyses required by the Water Code, and found that water was available for appropriation by the applicant, taking into account the instream flows needed to protect other legal users of water, fishery resources, and other beneficial uses.

In considering the application, the Division complied with CEQA. The Division prepared an Initial Study, and concluded that, with specified permit terms and conditions, the project would have less than significant impacts on the environment, including the riparian corridor and downstream fishery resources. After Clear Ridge agreed to the terms and conditions, the Division prepared and circulated a Mitigated Negative Declaration.

⁶ It is unclear whether Ms. Lockwood contends that the additional evidence is relevant evidence which, in the exercise of reasonable diligence could not have been produced (§ 768, subd. (c)). To the extent that Ms. Lockwood intended to invoke the provisions of section 768, subdivision (c), she has failed to comply with the procedural requirements of section 769, subdivision (b), described above.

Ms. Lockwood further alleges that the Division failed to consider other provisions and plans such as the Big Sur Protected Waterway Management Plan,⁷ yet neglects to identify the specific provisions of the plan that she believes are applicable to the project and were “ignored” or to explain why particular findings or studies in the plan, published 25 years ago, are contrary to, or more reliable than, the analyses for Application A030946 that are both current and project-specific. Analyses supporting the Initial Study were performed with the benefit of 53 years of historical United States Geological Survey (USGS) streamflow data, and assessed levels of cumulative impact at specific points within the Big Sur River watershed during both high- and low-flow periods. The analyses cited the use of precipitation data from the Big Sur Protected Waterway Management Plan. The Initial Study and Mitigated Negative Declaration for the project concluded that the project would not conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project adopted for the purpose of avoiding or mitigating an environmental effect.

To the extent Ms. Lockwood claims that the “flow and availability of water was prepared by a computer with inaccurate data” she did not establish that the USGS gage data is flawed, or explain how use of the data would result in a decision unsupported by substantial evidence. To the extent that Ms. Lockwood claims that the Division failed to conduct necessary additional studies, she did not identify the technical nature and scope of the additional studies needed, why they are necessary, or why the Decision is not supported by substantial evidence without them.

Ms. Lockwood further alleges that the decision lacks substantial evidence because the Applicant did not employ a registered hydrologist or geologist. She has not explained why studies performed by a hydrologist or geologist would be superior, established her own qualifications to render an expert opinion on this point, or demonstrated why the Decision is not supported by substantial evidence because a civil engineer instead of a hydrologist or geologist performed the analyses. The water availability and cumulative impact analysis for the Clear Ridge project was prepared in accordance with State Water Board protocol by a professional

⁷ The Big Sur Protected Waterway Management Plan, which addresses resources in the Lower Big Sur River, was prepared in coordination with state agencies and adopted by the Monterey County Board of Supervisors in 1985. The plan contains policies and recommendations to develop an integrated program of land and resource management that is intended to protect local and statewide interests and resources in the Lower Big Sur River.

civil engineer with over 23 years of professional experience in the field of civil, environmental, and water resources engineering. The analysis conducted was based on 53 years of historical data from the USGS Gauge No. 11143000, Big Sur River stream gage and the flow data was adjusted for existing appropriative water rights of record within the Big Sur River watershed. The hydrologic studies and environmental analysis were reasonable, comprehensive and of the appropriate scope to provide a sufficient basis upon which to determine potential cumulative impacts and whether a permit should be issued.

The record shows that the Division considered the evidence in the record regarding potential effects of the proposed project on fish and wildlife, and that the Decision includes substantially all the conditions of approval recommended by the Department of Fish and Game (DFG) as part of the protest resolution process. The petition for reconsideration cites no new evidence that would justify reconsideration of the Decision. The Decision is supported by substantial evidence and does not contain any error in law.

4.0 DR. MOTZEL'S PETITION

As discussed above, a petition for reconsideration of a decision or order shall contain certain information, including the date on which the order or decision was made by the State Water Board (§ 769, subd. (a)(3)), and a statement of points and authorities in support of the legal issues raised in the petition (*id.*, subd. (c)). Dr. Motzel did not submit the information above as required by section 769 of the regulations. Dr. Motzel's petition is denied for failure to comply with these procedural requirements.⁸

Moreover, Dr. Motzel's allegations lack merit. She first claims that the Decision involved an irregularity in the proceeding by which protestants were prevented from having a fair hearing (§ 768, subd. (a)); namely, that the Division conducted a field investigation in its Sacramento offices rather than on-site in the Big Sur area. Water Code section 1345 requires the Division to conduct a field investigation of a minor protested application in order to enable interested parties to attend and present information regarding the application. According to the Governor's Commission to Review Water Rights Law, the purpose of the minor protested application procedures was to encourage private settlement of protested applications in order to streamline

⁸ The regulations also require a petition for reconsideration to contain a "statement that copies of the petition and any accompanying materials have been sent to all interested parties." (§ 769, subd. (a)(6).) Dr. Motzel did not include such a statement in the petition, and did not appear to copy interested parties on the petition.

the water right application process. (Governor's Commission to Review Water Rights Law, Final Report (1978), at pp. 69-70.)

On July 19, 2010, the Division issued a Notice of Field Investigation for Application A030946, providing the applicant and the protestants an opportunity to resolve the outstanding protests and to provide the Division with information in support of their positions in accordance with Water Code sections 1334 and 1335. On August 18, 2010, due to lack of State travel funds, the Division held the meeting in Sacramento and provided interested parties with an opportunity to participate by telephone. Dr. Motzel did not object to the location of the meeting and her representative, Mr. Motzel, participated in the meeting in person. At the meeting, as described in the Decision, Mr. Motzel described Dr. Motzel's concerns with the project. Given that Dr. Motzel did not object to the location of the meeting and her representative participated fully in the meeting, there is no evidence to support the conclusion that Dr. Motzel was deprived of a fair hearing.

In raising this issue, it appears that Dr. Motzel's primary concern is for the State Water Board to witness, first hand, that Clear Ridge is diverting water for agricultural, and not only domestic uses, and to witness the purported negative impacts of the diversion on the condition of the Big Sur River. The record indicates that Division staff previously visited the project site.

Nonetheless, to address Dr. Motzel's specific concerns, it merits noting that the Division issued Permit 21272 for the appropriation of water for domestic and fire protection uses, and thus, water can only be used for those purposes under the permit. Diversion or use of water under Permit 21272 for other purposes is unauthorized, and may be subject to enforcement.

(See, e.g., Wat. Code, §§ 1051 et seq. [administrative civil liability for unauthorized diversion or use of water]; 1832 et seq. [cease and desist orders].) Further, if Clear Ridge ever seeks to change the purposes of use under the permit, it must comply with applicable procedures, which involve public notice and an opportunity to object. (See, e.g., Wat. Code, § 1700 et seq. [establishing procedures for changes in the purpose of use].) Dr. Motzel was provided a reasonable opportunity to raise this issue at the investigation, and so was not denied the opportunity for a fair hearing on this issue. In any event, the issue raised regarding potential agricultural use is not directly relevant to the issuance of Permit 21272, which is for domestic and fire protection purposes.

As stated above, the hydrologic report prepared for the project provided the State Water Board with a comprehensive and historically-based assessment of the potential cumulative hydrologic impact of the project at points of interest critical to fish life on the Big Sur River. The report, in conjunction with the environmental analysis contained in the Initial Study and Mitigated Negative Declaration, has substantially informed the State Water Board and the DFG as to the extent of the potential hydrologic impacts of the existing diversion during low-flow months. These analyses provided sufficient evidence to support the findings of the Decision and the issuance of Permit 21272, based upon a schedule of limited diversions and other mitigating terms and conditions.

Dr. Motzel also contends that the Decision is not supported by substantial evidence because the DFG has not completed its instream flow assessment for the Big Sur River. As noted previously, a comprehensive hydrologic analysis of the potential cumulative impacts of the project was prepared based on an extensive record of historical Big Sur River stream gage data, so as to cover a wide range of water-year types. A comprehensive environmental analysis was conducted, and a Mitigated Negative Declaration issued. The Decision is supported by substantial evidence in the record, including the studies performed to date for the project. Nonetheless, Permit 21272 allows for the Division's consideration of additional studies as they become available. Should the DFG study or any other fisheries study be completed, Permit 21272 provides that the State Water Board, after notice and an opportunity for hearing, reserves jurisdiction to modify, delete, or add minimum flow requirements or related criteria for the protection of fish and wildlife in the Big Sur River.

Finally, Dr. Motzel asserts that the applicant should be required to provide information demonstrating that the diversion will not affect previously permitted or riparian diversions. Water Code section 1375, subdivision (d) requires that the State Water Board find that unappropriated water is available to supply the applicant. As explained above, the Division performed a detailed analysis of Application A030946 in accordance with the Water Code section 1375, other provisions of the Water Code, and CEQA, and concluded that water was available for appropriation by the applicant.

Dr. Motzel currently diverts water from the Big Sur River pursuant to water right registration D031117R. As noted in the Decision, this registration is junior in priority to Application A030946, and therefore cannot support a protest based on priority of right.

5.0 CONCLUSION

In conclusion, Ms. Lockwood's petition should be denied for failure to comply with section 769 of the regulations. Dr. Motzel's petition also should be denied for failure to comply with section 769.

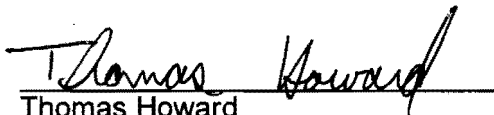
Moreover, I find that the petitions for reconsideration should be denied because the Decision is appropriate and proper. The Decision is supported by substantial evidence and does not contain an error in law. To the extent that any issue raised in the petitions is not addressed in this order, I conclude that the issue is not a substantial issue that merits review. (§ 770, subd. (a)(1).)

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration filed by Ms. Lockwood and Dr. Motzel are denied.

Dated:

5/27/2011


Thomas Howard
Executive Director

