

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 18955 and)
18956, Issued on Applications 27020)
and 27101,)
MICHAEL and GRACE JACOBS)
FAMILY TRUST,)
Permittee.)

ORDER: WR 83-16

SOURCES: Chandler Gulch and
Shaw Gulch

COUNTY: San Mateo

ORDER AMENDING PERMIT AND DENYING PETITION OF JUDY AND CHARLES BUTLER
FOR RECONSIDERATION OF ISSUANCE OF PERMITS

BY THE BOARD:

1. Applications 27020 and 27101 were filed in September 1981. As permitted, 49 acre-feet per annum may be appropriated by offstream storage from Chandler Gulch at the rate of 0.5 cubic feet per second under Application 27020, and 5 acre-feet per annum may be appropriated by offstream storage from Shaw Gulch at the rate of 0.5 cfs under Application 27101. Both permits authorize diversion to storage from December 1 through April 30 of each year. The purposes of use are irrigation, fire protection, and recreation.

2. Protests were filed by Judy and Charles Butler (hereinafter petitioners) and by two other downstream water users. Pursuant to Water Code Section 1345 et seq. which specify the procedure for Board action on minor protested applications, a field investigation was conducted in response to the protests and a staff analysis was prepared and sent to the applicant and protestants, including petitioners. The staff analysis recommended approval of the applications subject to terms and conditions which would

protect prior downstream water rights, protect fish and water quality, and require proper construction of the planned dams.

After receiving the staff analysis, petitioners requested a hearing. Under Water Code Section 1347, "[a] request for hearing shall specify the issues unresolved among the parties, and the Board shall restrict any hearing to consideration of such unresolved issues." Rather than questions which could be addressed by the restricted hearing intended by Water Code Section 1347, petitioners' "issues" consisted of a long list of factual assertions, points of law, questions to the Board and requests.

3. By letter of July 28, 1983, the Division of Water Rights informed petitioners that the applications would be processed and that the request for a hearing would not be accepted. This action was taken because petitioners' request for hearing failed to specify unresolved issues so that a restricted-issue hearing could be noticed and held, as required by Water Code Section 1347.

4. Permits 18955 and 18956 were issued on Applications 27020 and 27101 on August 18, 1983.

5. Within the 30-day reconsideration period, petitioners wrote a letter to the Chairwoman, again requesting a hearing. This letter substantially complied with Board rules regarding the form of a petition for reconsideration pursuant to 23 Cal. Admin. Code Sections 737.1 and 737.2 and was accepted as such. It appears to allege causes for reconsideration under Section 737.1(a) and (d), as follows:

"(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;"

"(d) Error in law."

6. While the points raised by the petitioners remain unclear, they appear to be as follows:

a. That staff dismissal of petitioners' protest and refusal to schedule a hearing denied petitioners' hearing rights;

b. That the Board failed to comply with the requirements of the California Environmental Quality Act (CEQA);

c. That the Board failed to comply with the requirements of its regulations at 23 Cal. Admin. Code Sections 723, 724, 725 and 729;

d. That the proposed dams will place them in danger of floods resulting from dam failure.

7. The first issue is that petitioners' protest was dismissed without a hearing. The two permits were granted on "minor protested applications", as this term is defined in Water Code Section 1348. Water Code Section 1347 states that a request for a hearing on a minor protested application "shall specify the issues unresolved among the parties, and the Board shall restrict any hearing to consideration of such unresolved issues."

a. In accordance with Section 1347, the Board must restrict the hearing to specified unresolved issues. To be heard by the Board, issues under Section 1347 must be those that the Board has authority to resolve, and they must be stated sufficiently clearly, understandably, and specifically so that the matters actually in controversy can be discerned, notice given thereof, and the hearing restricted accordingly. The applicant and other parties, no less than the Board, have a right to this procedural standard in proceedings on minor protested applications. The points raised by petitioners as issues in

their May 3, 1983, letter are a mixture of assertions of fact, law, questions to the Board and requests for documents and information. Petitioners' request for hearing does not meet the procedural standard.

b. Further, petitioners in their May 3, 1983 request for a hearing prefaced their list of 40 numbered points with the statement that, "[t]he following summarizes [sic] just a few of the significant remaining unresolved protest issues" (emphasis added). We conclude that a necessary implication of Water Code Section 1347 is that all unresolved issues be specified in a request for hearing. There are to be no surprise issues at hearing. Petitioners' list of issues being admittedly partial, their request for hearing failed in this respect to comply with Section 1347.

8. In the second issue, petitioners allege that the Board has failed to comply with the requirements of CEQA. The Board has determined that the project is exempt from CEQA under Categorical Exemption Class 4, set forth at 14 Cal. Admin. Code Section 15304, because it is a minor alteration to land, water and vegetation which does not involve removal of mature natural vegetation, will not cause significant adverse effects on a sensitive environment, and will not result in significant cumulative impacts. Each of the projects involves offstream storage of a relatively small amount of water. Since the projects are offstream, barriers will not restrict the use of the stream by fish, and will leave the stream in its natural course. The projects will not remove enough water from the stream to impair instream beneficial uses. Under these facts, the projects are exempt from CEQA.

9. In the third issue, petitioners allege that the Board has failed to comply with its regulations at 23 Cal. Admin. Code Sections 723, 724, 725 and 729.

a. Sections 723 and 724 concern the procedure for, and content of, answers to protests. Apparently petitioners are complaining that the Division of Water Rights has violated these sections by its response to the petitioners' protest. Petitioners characterize the Division's June 17, 1983, letter as "not responsive". First, we find that the Division did respond as fully as possible to the protest in its letter dated June 17, 1983. Where the protest's points were vague or incomprehensible, the Division could not respond extensively, of course. Second, we observe that Sections 723 and 724 require a response from the applicant, not the Division of Water Rights. Thus, the Division was not required by these sections to answer the protests at all. Therefore the June 17, 1983, letter could not have violated these sections.

b. Section 725 concerns deferral of CEQA documents to allow time for negotiation of protests, etc. Petitioner does not state how this section was violated by the Board's procedure in this matter. We find that this section has not been violated.

c. Section 729 requires that the Board at the request of a party identify the benefits and detriments of the present and prospective beneficial uses of water involved, and alternative means of satisfying or protecting such uses. Petitioners apparently claim that they requested such an investigation and that it was not done. However, we find that the requirements of Section 729 have been satisfied by the Staff Analysis and Recommendation prepared under Water Code Section 1345 and dated April 7, 1983.

10. The fourth issue is petitioners' allegation that the proposed dams will place them in danger of floods resulting from dam failure. While petitioner points out correctly that some dams have failed, we cannot find that the proposed dams will fail because other dams have failed. Since the dams will be offstream, the danger of failure is, as stated in the staff analysis at page 8, much less than it would be if the dams were onstream where they would receive heavy stream-borne runoff. To further reduce the chance of failure, the permits require that construction of the dams and reservoirs be under the direction of a registered civil engineer or pursuant to U. S. Soil Conservation Service specifications.

The danger of dam failure raised by petitioners is speculative. The data which they have provided does not establish that the proposed dams will present any significant danger of failure. Consequently, we find petitioners have alleged no basis to deny the permits because of dam safety problems.

11. Petitioners have correctly observed that the flow bypass term proposed in the staff analysis for Application 27101 (Shaw Gulch) was not included in the permit issued on that application. This omission was inadvertent. Said permit should include the flow bypass term proposed in the staff analysis.

ORDER

1. The petition is denied.


2. The last sentence of Condition 5 of Permit 18956 is amended to read:

"The maximum rate of diversion to offstream storage from Shaw Gulch shall not exceed 0.5 cubic foot per second or one-half of the flow in Shaw Gulch, whichever is less."

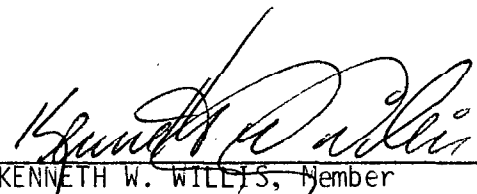
3. Issuance of Permit 18955 and 18956, as amended, is affirmed.

Dated: November 17, 1983


CAROLE A. ONORATO, Chairwoman


WARREN D. NOTEWARE, Vice Chairman


F. K. ALJIBURY, Member


KENNETH W. WILLIS, Member

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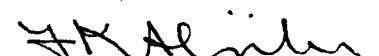
Dated: November 17, 1983




CAROLE A. ONORATO, Chairwoman



WARREN D. NOTEWARE, Vice Chairman



F. K. ALJIBURY, Member



KENNETH W. WILLIS, Member