

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 19004 )  
Issued on Application 27531, )  
BES HYDRO, INC., )  
Permittee, )  
WALTER HAMMEKEN, )  
Protestant. )

---

ORDER: WR 88-8  
SOURCE: Powerhouse Canal  
COUNTY: Mendocino

ORDER DENYING PETITION FOR RECONSIDERATION  
OF ORDER WR 88-3

BY THE BOARD:

1.0 INTRODUCTION

The Board having issued Order WR 88-3 on February 18, 1988; a petition for reconsideration having been filed on March 18, 1988, by Walter Hammeken; and the petition having been duly considered; the Board finds as follows:

2.0 GROUNDS FOR RECONSIDERATION

Section 758 of Title 23 of the California Code of Regulations provides that reconsideration of a Board decision or order may be requested for any of the following causes:

- a. A procedural irregularity which has prevented the petitioner from receiving a fair hearing;
- b. The decision is not supported by substantial evidence;

c. There is relevant evidence available which, in the exercise of reasonable diligence, could not have been produced at the hearing;  
or

d. An error in law.

### 3.0 SUMMARY OF PETITION

Board Order WR 88-3 approved a change in the point of diversion for the BES Hydro, Inc. (hereinafter, BES Hydro) project on the Powerhouse Canal in Mendocino County under Permit 19004 (Application 27531). The order approved movement of the diversion dam approximately 35 feet upstream of the original location and dismissed the complaint of Walter Hammeken against operation of the project utilizing the new point of diversion. The petition for reconsideration requests the Board to reconsider Order WR 88-3 on the grounds that it is not supported by substantial evidence and that the order is based on errors in law.

Petitioner Walter Hammeken contends that he received inadequate notice of the water right application of permittee BES Hydro because the Board files on Application 27531 include a map showing an incorrect elevation of the dam originally proposed to be utilized in the project. Petitioner contends that the elevation shown on the map and other information in the files on Application 27531 could lead to the conclusion that the actual water level behind the dam utilized by BES Hydro would be less than it actually is. Petitioner also contends

that in determining the upstream water elevation which could be expected to result from operation of the BES Hydro project, the Board relied on evidence not contained in the files on Application 27531 and thereby deprived petitioner of his due process right of notice.

Petitioner requests that the Board reconsider Order WR 88-3 and determine the issue of prior rights (under Permit 19004) on the basis of the submittals contained in Application 27531 prior to the issuance of Permit 19004 on September 30, 1983. Petitioner also requests that any change in point of diversion under Permit 19004 be approved "only to the extent of an appropriately noticed application". Finally, petitioner argues, with no citation of authority, that an application must specify a water level which could reasonably be expected to occur from development of the proposed project. In summary, petitioner's request for reconsideration is based upon an alleged lack of notice regarding the upstream water elevation which would result from development of the BES Hydro project.

#### 4.0 ANALYSIS OF ISSUES RAISED BY PETITION

##### 4.1 Upstream Water Elevation

Board Order WR 88-3 determined that the change in point of diversion requested by BES Hydro did not result in a greater upstream water elevation than could reasonably have been expected under the permit as originally issued. The top elevation of the original diversion dam and the upstream diversion dam identified in the change petition are the same. Both structures utilize flashboards to raise the effective

height about five feet, and the operation of the project at either location was designed to allow approximately two feet of overflow during shutdown conditions.

The Board's determination of the upstream effect of the BES Hydro project as originally proposed was based upon Application 27531 and the written project description attached to the application. BES Hydro presented testimony at the hearing which reviewed how the upstream water elevation could be determined based on the description submitted with the original application and explained how the movement of the dam upstream would not result in an increased water elevation. There is nothing improper in the fact that Order WR 88-3 referred to such testimony to resolve the question raised by Walter Hammeken regarding the effect which moving the diversion dam would have upstream. Indeed, resolution of that question was one of the primary purposes of the hearing.

#### 4.2 Statutory Notice Requirements

The arguments regarding notice of Application 27531 presented in the petition for reconsideration indicate that the petitioner's objection to the change in point of diversion approved by Order WR 88-3 is, in essence, an objection to the original approval of Application 27531. Order WR 88-03 explains at length why the change in point of diversion does not adversely impact other users of water. In reply, petitioner Hammeken contends that Application 27531 was inadequately noticed because the water level which reasonably could be expected to occur

was not specified. The required content of a notice of an application to appropriate water is specified in Water Code Section 1301 as follows:

"The notice shall specify all of the following:

- (a) The number of the application.
- (b) The name and address of the applicant.
- (c) The date of filing.
- (d) The source of supply.
- (e) The amount applied for.
- (f) The season of diversion.
- (g) The location of the point of diversion.
- (h) The use to be made.
- (i) The location of the place of use.
- (j) The date of issuance of the notice.
- (k) Such other information as the board deems necessary. "

As is apparent from the above statute, there is no requirement that the notice of a water right application specify the upstream water elevation which will result from development of the project.

More importantly, if Walter Hammeken wished to seek reconsideration or judicial review of the original approval of Application 27531 due to some alleged deficiency in notice, he was required to do so within 30 days after approval of the application. Permit 19004 was issued on September 30, 1983 and the petitioner has been aware of the project

authorized by the permit for several years. The time for raising a theoretical objection about insufficient notice of the original project has long since passed.

4.3 Petitioner's Familiarity With BES Hydro Project

Petitioner Hammeken filed water right Application 28668 on December 18, 1985, more than two years after Application 27531 of BES Hydro was approved. Hammeken received Permit 20017 on February 25, 1987. Prior to receiving Permit 20017, Hammeken lacked an approved water right for the project which he now asserts will be injured. Hammeken testified at the hearing preceding Order WR 88-3 that if he had been put on notice of the effect of the BES Hydro project on the upstream water level, he absolutely would not have undertaken construction of his project. Yet the record is clear that on May 22, 1986, in response to the notice of Hammeken's water right application, BES Hydro advised the Board that there may be a conflict between the upstream project which Hammeken proposed and the BES Hydro project as authorized by water right Permit 19004 and the Federal Energy Regulatory Commission. Hammeken acknowledged he was informed of this letter and that he discussed it with Mr. Strickler of BES Hydro.

Even though he was expressly advised in May of 1986 of the potential conflict between his proposed project and the previously approved BES Hydro project, Hammeken testified that he never closely reviewed the files on the BES Hydro project until two or three weeks prior to the October 30, 1987 hearing. As explained in Section 4.1 above, the

written project description attached to Application 27531 provided sufficient information to determine the upstream effects of the project.

Hammeken also acknowledged that in early 1985, he received a copy of BES Hydro's application for a license from the Federal Energy Regulatory Commission which indicates that the water elevation upstream of the BES Hydro project would be 980 feet above mean sea level. In addition, the fact that Hammeken had been involved in negotiations to supply turbine-generators for the BES Hydro project supports the conclusion that Hammeken was well-informed of the BES Hydro project. The contention that Hammeken was somehow misled about the upstream effects of the BES Hydro project simply is not supported by the record.

5.0 CONCLUSION

The record shows no support for the contention that there was inadequate notice provided for Application 27531 or for the petition to change the point of diversion from the location originally specified. To the contrary, the record shows that applicable noticing requirements were met. Further, the record shows that Walter Hammeken personally had ample notice and opportunity to determine the probable upstream effects of the BES Hydro project on his proposed project well before he received a water right permit. The Board concludes that the petitioner has raised no basis for reconsideration of Order WR 88-3.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition for reconsideration of Order  
WR 88-3 is denied.

CERTIFICATION

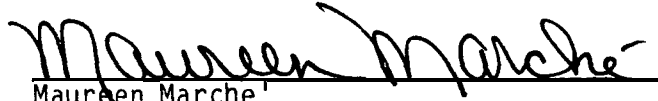
The undersigned? Administrative Assistant to the Board, does hereby certify  
that the foregoing is a full, true, and correct copy of an order duly and  
regularly adopted at a meeting of the State Water Resources Control Board held  
on

AYE: W. Don Maughan  
Danny Walsh  
Eliseo M. Samaniego

NO: None

ABSENT: Darlene E. Ruiz  
Edwin H. Finster

ABSTAIN: None

  
Maureen Marche  
Administrative Assistant to the Board