

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001-13

In the Matter of WR ORDER 2001-04-DWR Implementing
Condition 6 of Order WR 95-10
As Modified By Order WR-98-04
California-American Water Company

SOURCE: Carmel River

COUNTY: Monterey

ORDER GRANTING RECONSIDERATION OF WR ORDER 2001-04-DWR

BY THE BOARD:

1.0 BACKGROUND

On July 6, 1995, the State Water Resources Control Board (SWRCB) adopted Order WR 95-10 regarding complaints filed against the California-American Water Company (Cal-Am) concerning Cal-Am's operations on the Carmel River in Monterey County. Petitions for writ of mandate were filed challenging Order WR 95-10. As part of the settlement of the litigation, on February 19, 1998, the SWRCB adopted Order WR 98-04, which amended Order WR 95-10. Condition 6 of Order WR 95-10, as modified by Order WR 98-04, (Condition 6) requires Cal-Am to evaluate whether its existing diversions to the Carmel Valley Filter Plant (CVFP) can be changed to maintain more surface flow in the Carmel River.

Condition 6 states:

“Cal-Am shall conduct a study of the feasibility, benefits and estimated costs of supplying water to the areas now served by the CVFP from its more nearby wells downstream of the plant and shall also conduct a similar study of utilizing the existing or expanded Begonia Treatment Plant or other facilities located further downstream in lieu of the Carmel Valley Filter Plant. This latter study shall be completed within one year of the date

of entry of this Order. Petitioners shall have an opportunity to comment on the scope of the study. The study shall be under the direction of the Division of Water Rights, and will be conducted by a consultant approved by the Division. If the Chief, Division of Water Rights, finds that the measures identified in the studies are feasible, Cal-Am must implement supplying water from the facilities identified by the Division according to a schedule approved by the Division of Water Rights.

“The objective of supplying water from the wells is to maintain surface flow in the stream as far downstream as possible by releasing water from San Clemente Dam for maintenance of fish habitat. The results of the study and recommendations shall be provided to the District and DFG for comment.”

Cal-Am completed two studies pursuant to Condition 6. The petitioners and others were given an opportunity to comment on the scope of the studies, were provided copies of the studies upon request, and were given an opportunity to comment on the completed studies. On April 18, 2001, in WR Order 2001-04 DWR (Order), the Chief, Division of Water Rights, ordered a modification of the diversion practices of Cal-Am in accordance with Condition 6.

Petitions for reconsideration of the Order were received from Cal-Am, the Monterey Peninsula Water Management District (District), the Carmel River Steelhead Association (CRSA) and the Ventana Chapter of the Sierra Club (Sierra Club), and the National Marine Fisheries Service (NMFS).

2.0 THE LAW GOVERNING RECONSIDERATION

Water Code section 1122 provides for reconsideration of decisions and orders upon petition filed within 30 days of adoption of the decision or order. Title 23, California Code of Regulations, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:

- “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."

Requirements for petitions for reconsideration are set forth in California Code of Regulations, title 23, section 769. Subdivision (c) of section 769 provides that petitions for reconsideration shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.

Actions that the SWRCB may take on reconsideration are set forth in California Code of Regulations, title 23, section 770. The SWRCB may refuse to reconsider the order, deny the petition, set aside or modify the order, or take other appropriate action.

3.0 SUMMARY OF THE PETITIONS

3.1 Cal-Am

Cal-Am requests reconsideration alleging that because the Chief of the Division of Water Rights issued the Order based on the two Cal-Am studies and comments from the parties, without additional proceedings including an opportunity to comment on a draft order, Cal-Am was prevented from having a fair hearing and was not allowed to provide relevant evidence.¹ Cal-Am also alleges that the SWRCB erred in law by issuing the Order based on a categorical exemption from the California Environmental Quality Act.

Cal-Am requests an opportunity for public review and comment before issuance of a final order, including an opportunity for Cal-Am to meet with SWRCB staff to discuss how the intent of the Order can be satisfied. Cal-Am also requests that the deadlines in the Order be extended.²

¹ The petition also alleges that the Order is not supported by substantial evidence, but the arguments made in the petition in support of this allegation amount to a duplication of Cal-Am's other allegations that the process was unfair and that it was not allowed to provide relevant evidence. The petition does not identify any finding that is not supported by evidence in the record; rather Cal-Am argues that there is other evidence outside the record that should have been considered.

² Cal-Am also requested a stay pending action on its petition for reconsideration. The request is moot because no action is required by Cal-Am until the SWRCB has taken final action on the petitions for reconsideration.

3.2 District

The District alleges that portions of the Order would have unintended consequences and, unless modified, are not supported by substantial evidence. The District requests that the Order be modified to “(1) limit direct diversion of water only to Cal-Am customers in the upper Carmel Valley above the Narrows, (2) allow direct diversion of water from San Clemente Reservoir during high flow winter months, and (3) allow diversions from new wells in AQ4.”

3.3 CRSA and Sierra Club

The CRSA and the Sierra Club allege that the Order is not supported by substantial evidence. They request that Cal-Am fund a supplemental study to be completed by December 31, 2001; that interested parties be given 45 days to comment on the study; and that the Chief, Division of Water Rights, make a new determination of feasibility by April 30, 2002. Pending completion of the new study and feasibility determination, the CRSA and the Sierra Club request that, effective immediately, Cal-Am supply water to the Carmel Valley Village from the Scarlett well or adjacent wells in the upstream end of AQ3 during periods of low flow and not divert any water from wells in AQ1 and AQ2 or through the CVFP during periods of low flow, except during an emergency. If Cal-Am is unable to immediately supply water to the Carmel Valley Village from its wells in AQ3 during periods of low flow, the CRSA and the Sierra Club request that Cal-Am immediately limit diversions through the CVFP to 1.25 cubic feet per second (cfs) during periods of low flow, except during an emergency.

3.4 NMFS

NMFS alleges that the Order is not supported by substantial evidence and that the conditions set forth in the Order are inadequate to avoid or minimize the take of steelhead. NMFS further alleges that the Order is inconsistent with the public trust doctrine and with the intent of Order WR 95-10 and Order WR 98-04. NMFS requests that the SWRCB modify the Order but does not offer any suggestions regarding how the Order should be modified.

4.0 DISCUSSION

All of the petitioners for reconsideration allege that the Order is not supported by substantial evidence or that additional evidence is available that should be considered. Cal-Am, and the CRSA and the Sierra Club request that they be allowed to provide additional comments on the Order. The Chief of the Division of Water Rights was not required to consider anything other than the two studies submitted by Cal-Am in accordance with Condition 6 in making the determination of feasibility of the measures identified in the studies. Further, Condition 6 does not require that the Division solicit comments on a draft order nor does it require that a hearing be held to determine the feasibility of the measures identified in the studies. Accordingly, the Chief of the Division of Water Rights complied with the terms of Condition 6.

The petitioners claim that there is relevant evidence in addition to the two studies conducted pursuant to Condition 6 that the SWRCB should consider in determining feasible alternatives to supplying water to the areas now served by the CVFP. Although the Division Chief was not required to consider any information other than the two studies, we believe that all relevant evidence should be considered in determining a modification of the diversion practices of Cal-Am to ensure that the recommended modification is feasible and will accomplish the objective stated in Condition 6. Accordingly, the SWRCB concludes that a hearing should be held to receive evidence on whether WR Order 2001-04-DWR should be modified to accomplish the objective stated in Condition 6 and, if so, how. The petitioners should provide the SWRCB with the ///

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relevant information they claim the SWRCB should consider and should submit any additional studies that they deem necessary as hearing exhibits.

ORDER

IT IS HEREBY ORDERED that the petitions for reconsideration of WR Order 2001-04-DWR filed by Cal-Am, the District, the CRSA and the Sierra Club, and the NMFS are granted.

IT IS FURTHER ORDERED that the Chief, Division of Water Rights, shall schedule a hearing for the limited purpose of receiving evidence on whether WR Order 2001-04-DWR should be modified to accomplish the objective stated in Condition 6, and, if so, how the Order should be modified. The hearing shall be scheduled as soon as practicable.

CERTIFICATION

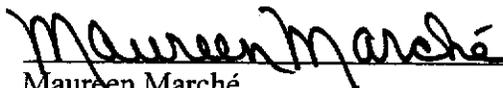
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 21, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Clerk to the Board