

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2006-0005-EXEC

In the Matter of Petition for Reconsideration of
Division Decision 2005-01 Approving Application 30933

TROUT UNLIMITED,

Petitioner.

SOURCES: Unnamed Stream Tributary to Mill Creek, thence Dry Creek, thence Russian River

COUNTY: Sonoma

ORDER DENYING THE PETITION FOR RECONSIDERATION

BY THE EXECUTIVE DIRECTOR

1.0 INTRODUCTION

By this order, the Executive Director of the State Water Resources Control Board (State Water Board or SWRCB) denies Trout Unlimited's (TU) petition for reconsideration of Division Decision 2005-01. In that decision, the State Water Board, Division of Water Rights (Division) conditionally approved water right Application 30933. TU contends that Division Decision 2005-01 is not supported by substantial evidence and does not comply with applicable laws. For the reasons set forth below, the Executive Director concludes that Division Decision 2005-01 was appropriate and proper, and therefore TU's petition for reconsideration is denied.

2.0 BACKGROUND

On September 17, 1999, Michael B. and Lorene Kuimelis (hereafter referred to as the applicants or permittees) filed Application 30933, seeking to appropriate 20 acre-feet per annum (afa) of water from an unnamed stream tributary to Mill Creek, thence Dry Creek, thence the Russian River in Sonoma County. The applicants proposed to store the water in a reservoir located on

the unnamed stream. The proposed diversion season was from December 15 of each year to March 31 of the succeeding year. The proposed purposes of use were irrigation of 25 acres of vineyard, fire protection, and recreation.

The U.S. Fish and Wildlife Service, National Marine Fisheries Service (NMFS), Sonoma County Water Agency, Kurt and Lea Gilg, and TU filed protests against the application. Eventually, all of the protests were resolved, except for TU's protest.

The Gilgs' protest alleged that approval of Application 30933 would result in injury to their water right. The Gilgs divert water from an onstream reservoir located approximately 300 feet downstream from the applicants' project under Small Domestic Use Registration Number 390 (Application A030758R).

TU's protest alleged that approval of Application 30933 would adversely affect habitat for coho salmon and steelhead trout. The record indicates that the Russian River, Dry Creek, and Mill Creek provide habitat for salmon and steelhead, but the unnamed stream does not provide significant habitat due to its steep gradient near its confluence with Mill Creek. (Draft Initial Study and Negative Declaration for Water Right Application 30933, Sonoma County, California (March 2002) pp. 8-9.) The unnamed stream below the Gilgs' reservoir may, however, provide some habitat for other fish species, such as the Pacific lamprey. (*Id.* at p. 10.)

Water Code section 1347 delegates to the Division the authority to act on minor, protested water right applications, such as Application 30933, after conducting a field investigation. (A minor application is an application to divert no more than three cubic feet per second (cfs) or to store no more than 200 afa. (Wat. Code, § 1348.) The Division may approve a minor, protested application if the Division determines that water is available for appropriation, taking into consideration the amount of water needed to satisfy senior water right holders, and, whenever it is in the public interest, the amount of water required to remain in the source for recreation, fish and wildlife, and other instream beneficial uses of water. (Wat. Code, §§ 1201, 1243, 1243.5, 1258.) In evaluating a water right application, the State Water Board or Division also must

ensure the protection of public trust uses, including fish and wildlife habitat, whenever feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.)

The Division conducted a field investigation of Application 30933 on March 28, 2003. During the field investigation, Division staff observed that the applicants already had constructed a reservoir on the unnamed stream.

In addition to conducting a field investigation, the Division evaluated the potential environmental impacts of the project as required by the California Environmental Quality Act (CEQA). The Division reviewed and considered an initial study and draft mitigated negative declaration, and determined that the project would not have a significant effect on the environment, provided that certain mitigation measures were implemented. Accordingly, the Division adopted the mitigated negative declaration. (Division Decision 2005-01, pp. 1, 8.)

On November 2, 2005, the Division issued Division Decision 2005-01. The decision determined that water was available for appropriation by the applicants and approved Application 30933, subject to certain conditions developed during the protest resolution process in order to protect senior water right holders and public trust resources. The decision also included as conditions of approval mitigation measures developed during the CEQA process. Following approval of the application, the Division issued water right Permit 21174 to the applicants.

On December 2, 2005, TU filed a petition for reconsideration of Division Decision 2005-01.

3.0 GROUNDS FOR RECONSIDERATION

Within 30 days of adoption of a Division decision on a minor, protested application, any interested person may file a petition for reconsideration of the decision. (Wat. Code, §§ 1122, 1347; Cal. Code Regs., tit. 23, §§ 768-770.)

Section 768 of the State Water Board's regulations 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.

Section 770 of the same regulations provides that on reconsideration, the State Water Board may:

- (1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration; or
- (2) After review of the record...
 - (A) Deny the petition upon a finding that the decision or order was appropriate and proper; or
 - (B) Set aside or modify the decision or order; or
 - (C) Take other appropriate action.

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

4.0 DISCUSSION

4.1 The Approval of an Onstream Reservoir was Consistent with the Draft Guidelines

TU's first contention is that the Decision approved an onstream reservoir on a Class II stream in violation of the Draft Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams, dated June 17, 2002, which were developed by NMFS and the Department of Fish and Game (Draft Guidelines). TU argues that the Division either implicitly found that the stream was a Class III stream, which TU alleges is unsupported by the evidence, or that the Division ignored the Draft Guidelines because the applicants already had built the onstream reservoir. TU argues that rewarding the applicants for constructing their project before obtaining a water right permit would establish a bad precedent.

As explained below, TU's contention lacks merit because the reach of the unnamed stream where the onstream reservoir is located is a Class III stream. Accordingly, approval of the onstream reservoir was consistent with the Draft Guidelines.

NMFS and the Department of Fish and Game (DFG) promulgated the Draft Guidelines in order to restore and protect anadromous salmonids in several coastal watersheds, including the Russian River watershed. The Draft Guidelines recommend that a number of terms and conditions be incorporated into water right permits for small diversions in order to preserve the instream flows that are necessary to protect anadromous salmonids. One of the terms and conditions contained in the Draft Guidelines is a prohibition against onstream reservoirs. (Draft Guidelines, p. 6.)

The justification for the prohibition is that onstream reservoirs: (1) eliminate free-flowing stream habitat that may support salmonids or aquatic invertebrates that serve as a food source for downstream fish; (2) reduce the magnitude and frequency of high flows necessary for channel maintenance; (3) trap coarse bedload material and impede bedload transport; (4) act as barriers to migrating fish; and (5) provide habitat for non-native species.

The Draft Guidelines provide an exception for a reservoir proposed to be located on a Class III stream, as defined by California Code of Regulations, title 14, section 916, provided that the project would not contribute to a cumulative reduction of more than ten percent of the natural

flow in any reach where fish are seasonally present, and the project would not dewater any stream reach that supports non-fish aquatic species. (Draft Guidelines, pp. 8-9.)

At the outset, it bears emphasis that the Draft Guidelines are not regulations, and they are not binding on the State Water Board. The Draft Guidelines are, however, evidence of the measures necessary to protect fishery resources. The Division's practice has been to consider the Draft Guidelines on a case-by-case basis. In this case, as TU notes in its petition, other aspects of Division Decision 2005-01 are consistent with the Draft Guidelines, but the decision failed to address whether approval of the onstream reservoir was consistent with the Draft Guidelines. A review of the record, however, reveals that approval of the onstream reservoir was in fact consistent with the Draft Guidelines.

The Draft Guidelines incorporate by reference definitions of Class I, II, and III streams contained in regulations adopted by the Board of Forestry. The regulations define a Class I stream as a stream where fish are always or seasonally present. (Cal. Code Regs., tit. 14, § 916.5, tab. 1.) A Class II stream is a stream within 1,000 feet of a reach where fish are always or seasonally present, or a stream that provides aquatic habitat for non-fish aquatic species. (*Ibid.*)

TU argues that the unnamed stream at issue in this case is a Class II stream because a consultant for the applicants found several types of aquatic insects (macroinvertebrates) in the stream during a biological resources survey conducted on March 28, 2000. The mere presence of macroinvertebrates, however, does not necessarily mean that the unnamed stream is a Class II stream. In a September 1, 2000, memorandum, the Assistant Deputy Director for Forest Practice clarified that for purposes of classification as a Class II stream, non-fish aquatic species means only aquatic vertebrates, not aquatic plants or invertebrates. (Memorandum from Dean Lucke to Unit Foresters, p. 2.) The record in this case contains no evidence that the unnamed stream at the project location provides habitat for aquatic vertebrates.

The presence of aquatic insects may in some cases indicate that a stream provides suitable habitat for aquatic vertebrates. As explained in an earlier guidance document from the Department of Forestry and Fire Protection, the presence of aquatic insects is a good indicator of

aquatic habitat for vertebrates because most aquatic insects require free water for a year or more to complete their life cycle. (Memorandum to Ross Johnson, Staff Chief, et al. (March 7, 1997) pp. 2, 4.) In this case, however, the presence of aquatic insects does not indicate the existence of habitat for aquatic vertebrates. The record indicates that the unnamed stream becomes dry at the project site by July of each year. During a site visit on August 31, 2000, a representative from NMFS observed that the stream was thoroughly dry and without aquatic organisms. NMFS reasoned that the macroinvertebrates found earlier “were undoubtedly young stages that were the progeny of winged adults that deposited eggs in the intermittent stream. These organisms either drifted downstream or were stranded and desiccated when flows subsided in the spring.” (Letter from James R. Bybee to Terry Snyder (September 22, 2000) p. 2.) NMFS concluded that the stream is probably a Class III stream. (*Ibid.*)

In summary, substantial evidence supports the finding that the reach of the unnamed stream where the onstream reservoir is located is a Class III stream. As indicated in the TU petition, this finding may have been implicit in the Division Decision. Because the Division Decision failed to adequately explain the basis of its decision, however, the Executive Director has independently weighed the evidence in the record, and finds that the reservoir is on a Class III stream.¹

In addition, the project satisfies the other two criteria outlined in the Draft Guidelines to qualify for an exception to the recommendation against onstream reservoirs. First, the project would not contribute to a cumulative reduction of more than ten percent of the natural flow in any reach where fish are seasonally present. The cumulative streamflow impact analysis prepared at the direction of Division staff found that the cumulative impairment of the project and all other known diversions is about 0.8 percent as measured at the confluence of the unnamed stream and

¹ A Division decision must make sufficient findings to enable the parties to determine the basis on which the decision was made. (See generally *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1356 [263 Cal.Rptr. 214, 217].) In this respect, Division Decision 2005-01 is inadequate, as it fails to adequately explain the Division’s basis for concluding either that approval of the onstream reservoir was consistent with the Draft Guidelines, or that following the Draft Guidelines was not appropriate in this case. This does not require a remand to the Division, however. On review of a petition for reconsideration, the Executive Director or the State Water Board may make any necessary findings based on the evidence in the record. (See Cal. Code Regs., tit. 23, § 770, subd. (a)(2)(B)&(C).) In the future, Division decisions should provide a better explanation as to how the Draft Guidelines were considered.

Mill Creek. (Draft Initial Study and Negative Declaration for Water Right Application 30933, Sonoma County, California (March 2002) appen. A, pp. 3-4.) The cumulative impairment measured at the confluence of Mill Creek and Dry Creek is about 1.0 percent. (*Ibid.*) Second, the requirement that the permittees bypass 0.09 cfs or the inflow into the reservoir, whichever is less, will ensure that the project will not dewater any stream reach that supports non-fish aquatic species.

Finally, it merits note that most of the reasons provided in the Draft Guidelines for prohibiting onstream reservoirs are negated in this case by the existence of the Gilgs' reservoir downstream. For example, the permittees' reservoir is located almost at the top of the unnamed stream. Even if their reservoir had been constructed offstream, in the unlikely event that fish would migrate that far up in the watershed, fish migration in the unnamed stream would be blocked by the Gilgs' reservoir. Similarly, construction of an offstream reservoir might allow bedload material and aquatic invertebrates to be transported downstream, but they would be trapped in the Gilgs' reservoir, and therefore would not benefit downstream fish.

4.2 The Cumulative Impacts Analysis Was Appropriate and Proper

TU's second contention is that the Division's cumulative impacts analysis was flawed because it did not take into account unauthorized diversions, which TU argues was inconsistent with the Draft Guidelines and CEQA. As explained below, this contention lacks merit because the Division did not exclude any known unauthorized diversions from its analysis.

Preliminarily, it is important to differentiate between the water availability analysis required by the Water Code, and the cumulative impacts analysis required by CEQA. As discussed in section 2.0 above, a water availability analysis must take into account senior water rights and the amount of water needed to remain in the source to protect instream beneficial uses. The fact that water is being diverted illegally does *not* mean that it is unavailable for appropriation. (See Wat. Code, §§ 1201, 1202.) Accordingly, a water availability analysis should not take into account existing unauthorized diversions, at least where doing so would result in the determination that water is unavailable for appropriation.

On the other hand, the cumulative impacts analysis required by CEQA should take into account known unauthorized diversions. In this case, however, the Division took into account all known diversions, authorized and unauthorized. The cumulative impacts analysis took into account both pending water right applications and statements of diversion and use, some of which may have been for existing unauthorized diversions. (Draft Initial Study and Negative Declaration for Water Right Application 30933, Sonoma County, California (March 2002) appen. A, p. 3; see Wat. Code, §§ 5100-5108 [requiring most persons who divert surface water and do not have a water right permit or license to file a statement of diversion and use, regardless of whether they claim to hold a water right].)

TU insinuates that the State Water Board knows of existing unauthorized diversions that were deliberately excluded from the cumulative impacts analysis. This is simply not the case. As TU notes in its petition, the Division has conducted a number of compliance investigations in Mendocino and Sonoma Counties that have revealed a number of unauthorized diversions. The Division had not yet initiated a compliance investigation in the Mill Creek watershed, however, at the time when the cumulative impacts analysis for Application 30933 was conducted and the Division circulated the mitigated negative declaration, containing the analysis, for public review and comment.² NMFS and DFG did not object to the cumulative impacts analysis, and TU has not identified any illegal diversions that the Division did not take into account.

Well after the public review period under CEQA had closed, the Division initiated a compliance investigation in the Russian River watershed within Sonoma County, which includes Mill Creek. The investigation is ongoing. To the extent that TU takes the position that the Division was required to conduct such a comprehensive, watershed-wide compliance investigation before it could take action on Application 30933, TU's position is unreasonable. Such a requirement would cause interminable delays in application processing, contrary to the Legislature's express finding in Assembly Bill 2121 (2003-2004 Reg. Sess.) that delays in application processing are inappropriate and cause regulatory uncertainty. (Stats. 2004, ch. 943, § 1, subd. (g).) CEQA did

² Normally, the environmental conditions that exist at the time the lead agency commences its environmental analysis constitute baseline conditions for purposes of evaluating environmental impacts under CEQA. (Cal. Code Regs., tit. 14, § 15125, subd. (a).)

not require such an intensive investigation in order to evaluate the cumulative environmental impacts of approving Application 30933. (See Cal. Code Regs., tit. 14, § 15205, subd. (a) [“CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors.”]; see also *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396-1397 [133 Cal.Rptr.2d 718, 729].)

4.3 Division Decision 2005-01 was Appropriate and Proper, even though the Applicants Constructed a Reservoir before Obtaining a Permit

TU’s remaining contentions relate to the fact that the applicants constructed a storage reservoir before they obtained a permit. First, TU contends that Division Decision 2005-01 does not ensure adequate monitoring and compliance because it relies on the permittees for monitoring and compliance, and they constructed their reservoir without authorization. As a practical matter, however, the Division must rely to some extent on self-monitoring and reporting. The Division’s budget does not allow for comprehensive monitoring of all permittees and licensees. In this case, Term 15 of Permit 21174 requires the permittees to submit a compliance plan to the Division Chief for approval. The plan must demonstrate compliance with the flow bypass requirements of the permit and include monitoring requirements. Term 15 also requires the permittees to report any noncompliance with the terms of the permit. In addition to relying on self-monitoring and reporting, the Division has a compliance and enforcement program, which includes periodic compliance inspections. As stated earlier, the Division has initiated a compliance investigation that includes the Mill Creek watershed.

TU also contends that the terms of Permit 21174 should be rewritten to reflect the fact that the reservoir has already been built. TU argues that some of the terms require certain actions prior to construction, diversion, or use of water under the permit, and those actions no longer are possible. TU contends further that the permittees should be required to mitigate for any harm caused by any permit term violations, such as constructing the reservoir without bypass facilities.

These issues are largely questions of enforcement and are not relevant to this proceeding. The issue in this proceeding is whether the Division’s conditional approval of Application 30933 was

appropriate and proper, not whether the permittees have violated conditions of their permit, or whether the State Water Board should take enforcement action. If the permittees did not satisfy the prerequisites to construction, diversion, or use of water under their permit, then they are subject to enforcement action. But the issue whether to take enforcement action against the permittees is not relevant to this proceeding. Moreover, the decision whether to take enforcement action is entirely discretionary. (See *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1242-1244 [216 Cal.Rptr. 879, 881-883]; see also *Citizens for a Better Environment – Cal. v. Union Oil Co. of Cal.* (9th Cir. 1996) 83 F.3d 1111, 1119-1120.) The Executive Director expresses no opinion on the issue whether enforcement is warranted in this case, but as a general rule, the fact that an unauthorized diverter has filed an application does not operate to shield the applicant from enforcement action. Nor does the approval of an application shield the permittee from enforcement based on diversion or use that occurred before the permit was issued.

5.0 CONCLUSION

TU's primary concern appears to be a belief that the Division rewarded the applicants for their decision to construct their reservoir by issuing them a permit for a project that is inconsistent with the Draft Guidelines. As explained above, however, this is not the case. Contrary to TU's contentions, the record supports the conclusion that approval of an onstream reservoir in this case was consistent with the Draft Guidelines because (1) the reservoir is located on a Class III stream, (2) the project will not contribute to a cumulative reduction of more than ten percent of the flow in any reach where fish are seasonally present, and (3) the project will not dewater any stream reach that supports non-fish aquatic species. Thus, the Division did not allow the applicants to avoid application of the Draft Guidelines. Instead, the applicants' project is consistent with the recommendations contained in the Draft Guidelines, and the project warranted approval. Accordingly, Division Decision 2005-01 was appropriate and proper, and TU's petition should be denied.

ORDER

IT IS HEREBY ORDERED THAT Trout Unlimited's petition for reconsideration is denied.

Dated: January 31, 2006

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director