

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2017-0009-EXEC

In the Matter of the Petition for Reconsideration by

Nancy K. Donovan and Stephen J. Peters

Regarding Order WR 2016-0025-DWR

SOURCE: Unnamed Stream tributary to Maple Creek thence Rancheria Creek thence
Navarro River

COUNTY: Mendocino County

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

This matter comes before the State Water Resources Control Board (State Water Board or Board) upon the issuance of Order [WR 2016-0025-DWR](#) (Order) by the Assistant Deputy Director on November 9, 2016, imposing a \$40,000 administrative civil liability (ACL) and a cease and desist order (CDO) for the unauthorized diversion of water from the unnamed stream tributary to Maple Creek.² On December 6, 2016, Nancy K. Donovan and Stephen J. Peters (Petitioners) timely filed a petition for reconsideration requesting a new hearing, and a stay of the Order pending the ruling on this petition. Petitioners raise no issue of concern with the Order itself; rather, they request an additional chance for a

¹ State Water Board Resolution 2012-0061 delegates to the Executive Director the authority to conduct and supervise the activities of the Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the Board, the Executive Director's consideration of a petition for reconsideration of a staff decision or order falls within the scope of the authority delegated under Resolution 2012-0061.

² Authority to issue ACL orders under Water Code section 1055 and cease and desist orders under Water Code section 1831 when a hearing is not requested is delegated to the Deputy Director by Resolution 2012-0029, and subsequently redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch.

hearing that was cancelled after their repeated noncompliance with administrative hearing procedures and ultimate failure to appear by the party entitled to participate on the scheduled hearing date. The petition states that Ms. Donovan was prevented from attending the hearing because her husband, Mr. Peters, intentionally prevented her from doing so. The petition also states that because Mr. Peters is not an attorney and not familiar with administrative procedures, he did not realize that he could not speak at the October 2016 hearing.

The State Water Board staff provided extraordinary assistance to Petitioners to afford them the opportunity for a fair hearing in this case, including frequent extension of due dates, and specific reminders, and yet Petitioners displayed repeated disregard for State Water Board processes that are necessary for the orderly administration of water rights. Any irregularity in the proceedings caused by Petitioners' actions is not a valid ground for reconsideration.

2.0 GROUNDS FOR RECONSIDERATION OF A DECISION OR ORDER

Within thirty (30) days of adoption of a State Water Board order or decision, any interested person may petition the State Water Board for reconsideration of a water right decision or order on any of the following grounds:

- (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.

(Cal. Code Regs., tit. 23, § 768.)

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 regulations. (*Id.*, § 770, subd. (a)(1).) Alternatively, after review of the record, the Board may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 LEGAL AND FACTUAL BACKGROUND

On June 14, 2012, the Assistant Deputy Director, assisted by the Office of Enforcement, issued an ACL complaint and a draft CDO against the Petitioners.³ By letters dated July 6, 2012 and July 18, 2012, Stephen J. Peters and Nancy K. Donovan, respectively and separately, requested a hearing on the complaint and the draft CDO. On March 13, 2015, the State Water Board sent a Notice of Public Hearing and scheduled a hearing for July 1, 2015. On March 17, 2015, Ms. Donovan requested a postponement of the hearing due to her ongoing medical condition and treatment. The Hearing Officers⁴ granted the request and issued a Notice of Postponement on April 10, 2015.

On November 13, 2015, State Water Board hearings staff contacted Ms. Donovan to discuss a new hearing date based on her availability. On November 18, 2015, Ms. Donovan provided her tentative availability, and on May 3, 2016, hearings staff provided advance notice of tentative rescheduled hearing dates in July 2016. On May 9, 2016, Ms. Donovan informed the State Water Board that she would not be available to attend a hearing until after September 15, 2016, as a result of the additional treatment for her illness.

The Hearing Officers granted another postponement of the hearing and on May 13, 2016, staff provided notice that the hearing would be tentatively rescheduled for October 12, 2016. On June 2, 2016, staff contacted Ms. Donovan to confirm her availability, which she confirmed on July 8, 2016. On July 21, 2016, the State Water Board issued a [Notice of Rescheduled Public Hearing](#) (supplementing the original March 13, 2015 Notice) which provided: (1) rescheduled hearing date and time of Wednesday, October 12, 2016 at 9:00 a.m.; (2) revised deadline of August 10, 2016, for participants to submit a Notice of Intent to Appear form (NOI) indicating the level of participation in the hearing and contact information; and (3) revised deadline of September 14, 2016, for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service for applicable parties presenting oral testimony as part of their case-in-chief. The

³ In water right enforcement cases, the State Water Board separates the functions of staff who act in a prosecutorial role by presenting evidence for consideration and those who advise the State Water Board (hearings staff). The "Prosecution Team" is considered the same as any other party in a hearing and is subject to the prohibition on ex parte communications and other procedural rules.

⁴ State Water Board Vice-Chair Frances Spivy-Weber and Member Steven Moore would have presided over the hearing had it taken place.

original [March 13, 2015 hearing notice](#) provided that failure to submit an NOI by the deadline provided would be deemed a withdrawal of the request for hearing and could result in adoption of the complaint and CDO without further notice. The State Water Board did not receive NOIs from the Petitioners.

By letter dated August 11, 2016, State Water Board staff provided Petitioners with an additional opportunity to submit NOIs by August 19, 2016, and advised the Petitioners that failure to submit an NOI could result in immediate cancellation of the hearing and could result in adoption of the complaint and CDO without further notice.⁵ On August 18, 2016, Ms. Donovan submitted an NOI indicating her intent to present a policy statement only. Mr. Peters did not submit a NOI.

Normally if a party indicates intent to provide a policy statement only, there would be no need to hold an evidentiary hearing because a policy statement is not considered evidence. On August 19, 2016, the State Water Board issued a [Service List of Participants](#) letter, instructing Ms. Donovan to clarify the extent of her participation. On August 24, 2016, Ms. Donovan submitted a revised NOI indicating her intent to participate as a party, and call herself as a witness to provide up to 30 minutes of testimony regarding facts specific to the complaint and draft CDO.⁶ Mr. Peters did not submit any NOI pursuant to instructions provided by the March 13, 2015 [Notice of Public Hearing](#), July 21, 2016 [Notice of Rescheduled Public Hearing](#), August 11, 2016 [Hearing Team Letter](#) and August 19, 2014 [Service List of Participants](#) letter and therefore was not considered a party to the proceeding. On August 24, 2016, the State Water Board issued a [Revised Service List](#) reflecting that the Prosecution Team and Nancy Donovan were the parties indicating intent to participate in the hearing and that the Department of Fish and Wildlife indicated intent to present a policy statement only. That letter reminded parties of the deadline to submit testimony and exhibits in bold red letters.

On August 29, 2016, staff issued another courtesy reminder that the deadline for receipt and service of proposed testimony and exhibits was September 14, 2016. Only the

⁵ On August 12, 2016, the Prosecution Team filed a *Motion for Default* based on the fact Ms. Donovan and Mr. Peters failed to timely submit a NOI as required for any party who wishes to take part in the hearing.

⁶ The [Revised Service List of Participants](#) listed the Prosecution Team and Nancy K. Donovan as parties intending to call witnesses to testify at the hearing, and California Department of Fish and Wildlife's intent to present a policy statement only.

Prosecution Team submitted testimony and exhibits in accordance with the requirement. Ms. Donovan did not submit any direct testimony or evidence and did not request any deadline extension. The procedural rule requiring that testimony and exhibits be submitted in advance is to prevent surprise testimony, such as the submittal of detailed and new bases for establishing key elements of a case-in-chief or defense that another party did not have time to review and prepare for. It may not always be necessary, especially if the testimony is not complicated, and a party is not represented by counsel and not familiar with detailed, court-like procedures, to exclude testimony for failure to comply with this procedural rule. The State Water Board has discretion to conduct a more relaxed hearing if appropriate for the circumstances and in this case decided to proceed with the hearing.

On September 22, 2016, staff sent the following in an email:

Parties are advised that failure to appear on the scheduled hearing date (scheduled to commence on October 12, 2016, pursuant to the July 21, 2016 [Notices of Rescheduled Public Hearing](#)) will be deemed a withdrawal of the party's request for hearing, and accordingly, the Board may adopt the proposed orders without further notice.

A week before the scheduled October 12, 2016 hearing, Petitioners requested another postponement indicating that the parties needed additional time to reach settlement; however, the Prosecution Team did not agree. On October 7, 2016, the Hearing Officers denied the request for postponement. The denial did not preclude the possibility for approval of a subsequent postponement request jointly proposed by both parties prior to the hearing.

On Wednesday, October 12, 2016, the hearing was called to order and Ms. Donovan was not present. Mr. Peters was present but he was not considered a party to the proceeding having never submitted an NOI, and having no written consent from Ms. Donovan to appear on her behalf. Given that Mr. Peters did not file a NOI, the absence of Ms. Donovan, and the consequences clearly communicated to the parties, the Hearing Officers deemed Ms. Donovan's failure to appear as a withdrawal of her request for a hearing and canceled the hearing. The State Water Board Hearing Officers and hearing team staff did not receive any further communication from Ms. Donovan that day or at any time up until receiving this petition for reconsideration. In the absence of a requested hearing, the Assistant Deputy Director was authorized to issue the proposed orders without further notice, which it did on November 9, 2016.

The Petitioners filed a timely petition for reconsideration, dated December 6, 2016.⁷ The petition for reconsideration and accompanying declaration of Ms. Donovan sets forth the following facts: 1) Mr. Peters is not an attorney or otherwise experienced with administrative procedures, and he did not realize that he could not speak at the October 12, 2016 hearing; 2) Ms. Donovan has been actively treated for cancer and has undergone chemotherapy and currently takes medications daily; and 3) Ms. Donovan was prevented from attending the hearing on October 12, 2016 before the State Water Board because her husband, Mr. Peters, intentionally prevented her from doing so.

Adjudicative hearings are conducted in accordance with the procedures set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760. Adjudicative hearings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board. (Cal. Code Regs., tit. 23, § 648.5, subd. (a)(4).) Under section 648.1, subdivision (c), persons who fail to comply with the procedural requirements specified in the hearing notice may be dismissed as parties to the proceeding.

Under California Code of Regulations, title 23, section 766, “[a]ny party who fails to appear at a hearing will not be entitled to a further opportunity to be heard unless good cause for such failure is shown to the board within five days thereafter. The lack of such showing of good cause may, in the discretion of the board, be interpreted as an abandonment of interest....”

4.0 DISCUSSION

A water right hearing is a quasi-judicial proceeding in the sense that due process standards must be afforded the participating parties. While the State Water Board understands that not all parties are familiar with the State Water Board's administrative procedures, and may

⁷ The Water Code directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the State Water Board adopts the decision or order that is the subject of the petition. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board 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 1133,1147-48, 1150-51; State Water Board Order WQ 98-05-UST at pp. 3-4.)

not be represented by an attorney, it is very important for parties to read, understand, and adhere to the procedural requirements specified in the hearing notices and enclosures. Compliance with specific forms and deadlines are necessary for the efficient administration of water rights and the hearing process. The State Water Board is sympathetic to Ms. Donovan's health issues as demonstrated by the procedural timeline of events, but there is a limit to what due process affords a party who does not conform to the process. If this incident was an isolated occurrence the State Water Board might be inclined to reschedule the hearing. However, Ms. Donovan's failure to appear was the culmination of repeated noncompliance with, and disregard for, the hearing procedures.

In this case, the State Water Board postponed the hearing for over a 15-month period to accommodate Ms. Donovan's medical treatments. After granting a second request for postponement, the October 12, 2016 hearing was not formally set until staff confirmed with Ms. Donovan that she could attend. After missing the first deadline and being granted additional time, Ms. Donovan eventually submitted a revised NOI indicating her intent to present herself as a witness. Ms. Donovan did not timely submit any written testimony, or any request for more time to submit written testimony, even though staff provided two follow-up reminders of the set deadline for submittal of testimony. After being directly advised of the consequences for failing to appear, Ms. Donovan did not show up for the hearing. She did not contact the State Water Board or hearing staff that day or at any time after the hearing to explain why she was not present for the hearing or show good cause for why she should be afforded another opportunity to be heard.

Petitioners were provided with every opportunity to have a fair hearing. Persistent noncompliance with procedural rules is not fair and can prejudice other parties to the hearing. In this case, the Prosecution Team generally conformed to all of the procedural requirements, and invested time and resources to prepare and be present for the hearing. Any irregularity in the proceedings in this case was caused by the Petitioners themselves, not the State Water Board. Petitioners have submitted no information that supports any argument for affording Ms. Donovan another opportunity for a hearing.

5.0 CONCLUSION

For the reasons stated above, I find that the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768. The petition for reconsideration is denied.

Dated: 3/24/2017

Tom Howard
Tom Howard
Executive Director