

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 15026)	ORDER:	WR 91-05
(Application 5632),)		
YUBA COUNTY WATER AGENCY,)	SOURCES:	North Yuba, Yuba
Permittee,)		Middle Yuba, and
CALIFORNIA SPORTFISHING)		Oregon Creek
PROTECTION ALLIANCE,)	COUNTIES:	Yuba, Nevada,
Interested Party.)		Butte, and Sutter

ORDER DISMISSING PETITION FOR RECONSIDERATION
OF APRIL 19, 1991 ORDER WHICH REVISED CONDITIONS
OF APPROVAL FOR TEMPORARY TRANSFER OF WATER
FOR USE IN NAPA COUNTY

BY THE BOARD:

1.0 INTRODUCTION

Yuba County Water Agency (YCWA) having filed a temporary change petition to transfer water for use in Napa County; the change having been approved on March 27, 1991 in an order signed by State Water Resources Control Board (State Board) Executive Director Walter G. Pettit; the conditions specified in the March 27 order having been revised in a subsequent order dated April 19, 1991; the California Sportfishing Protection Alliance (CSPA) having petitioned for reconsideration of the April 19 order; the issues raised by the petition for reconsideration having been duly considered; the State Board finds as follows:

BACKGROUND

On February 6, 1991, YCWA filed a petition for temporary changes under Water Code Section 1725 et seq. The petition was filed in order to transfer up to 7,500 acre-feet of water held in New Bullards Bar Reservoir for use by four member agencies of the Napa County Flood Control and Water Conservation District (i.e., the Cities of Napa, Calistoga, and St. Helena and the American Canyon County Water District, collectively referred to herein as "NAPA"). The proposed transfer would occur during the April 1, 1991 through October 15, 1991 period at a maximum direct diversion rate of 21 cubic feet per second (cfs).

The proposed transfer was approved on March 27, 1991 in an order signed by Walter G. Pettit acting pursuant to a delegation of authority from the State Board. The order specified a number of conditions, including maximum temperature requirements in the Yuba River which YCWA was directed to maintain. The specified temperature requirements were taken from State Board Order WR 90-8 which approved a transfer of 146,000 af of YCWA water in 1990.

On April 12, 1991, the State Board received a letter from Bookman-Edmonston Engineering, Inc., representing YCWA, requesting that the maximum temperature

requirements set forth in Condition 5 of the March 27 order be eliminated. Bookman-Edmonston requested elimination of the stated temperature requirements based on the contentions that the transfer to NAPA would result in slightly higher flows in the Yuba River than would otherwise exist, that the proposed transfer would not unreasonably affect instream values, and that the temperature requirements set in the March 27 order could not be assuredly met without requiring substantially greater flows in the Yuba River than would otherwise exist.

Based on information and a recommendation from the Department of Fish and Game (DFG), the conditions specified in the March 27 order were revised in an order entered on April 19, 1991, signed by Roger Johnson for Walter G. Pettit. The April 19 order sets forth minimum flow requirements and maximum temperature goals. YCWA is directed to make its "best faith efforts" to meet the temperature goals, but is not required to release additional water in order to maintain the specified temperatures.

On May 3, 1991, CSPA filed a petition for reconsideration of the April 19 order. The issues raised in the petition are discussed in Section 5.0 below.

3.0 **GROUNDS FOR RECONSIDERATION**

Section 768 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.

4.0 **SUMMARY OF PETITION FOR RECONSIDERATION**

The CSPA petition for reconsideration raises several objections to the April 19, 1991 order amending the conditions of approval of the YCWA-NAPA transfer. CSPA contends that the State Board gave inadequate public notice of the YCWA petition; that the April 19, 1991 order fails to protect steelhead trout in the Yuba River; that the order failed to protect spring-run Chinook salmon in the Yuba River; that the order failed

to require YCWA to release additional water into the Yuba River to sustain the anadromous fish; that the order failed to require mandatory water temperatures or releases to protect American shad; that the findings in the order were not supported by substantial evidence; that the order is in violation of the Davis-Grunsky Act (Water Code Section 12880 et seq.); and that, for all of the above reasons, the April 19 order was in violation of the State Board's duty to protect public trust resources and prevent adverse impacts to fish from water transfers pursuant to Water Code Section 1725 et seq.

CSPA also contends that the State Board should require YCWA to comply with the flow recommendations set forth in the Department of Fish and Game's (DFG) Lower Yuba River Fisheries Management Plan dated February 1991. In addition, CSPA objects that no cumulative impact analysis was done regarding the cumulative effects of the transfer, in conjunction with previous water transfers, on the Sacramento-San Joaquin Delta. Finally CSPA questions the legality of the State Board's delegation of authority to the Executive Director to approve temporary water transfers.

Among its specific requests for relief, CSPA requests that the State Board: (1) establish mandatory

temperature requirements to protect all anadromous fish in the Yuba River; (2) require flows sufficient to protect all life stages of anadromous fish in the river; (3) require compliance with the recommendations of DFG's recently completed Lower Yuba River Fisheries Management Plan; (4) immediately order a hearing on CSPA's pending complaint against YCWA; (5) investigate the Davis-Grunsky Agreement between YCWA and the Department of Water Resources; (6) request an opinion from the Attorney General on whether the State Board can delegate its public trust authority and responsibilities to a staff member; and (7) provide timely notice and opportunity for comments by the public and the U.S. Fish and Wildlife Service on all water transfers in the Yuba River and elsewhere in the State.

5.0 ANALYSIS OF ISSUES RAISED BY PETITION

5.1 Protection of Fish in the Yuba River

The majority of CSPA's contentions concern protection of various species of fish in the Yuba River and CSPA's position that the State Board has not done enough to protect the fish. In this regard, we note that CSPA has a complaint pending which alleges inadequate fishery protection requirements in the Yuba River and that DFG recently completed an extensive study regarding fishery management in the lower Yuba River.

The DFG report was received by the State Board on March 28, 1991.

On May 8, 1991, DFG requested that the State Board schedule a hearing to review and revise the minimum flow and temperature requirements on the lower Yuba River to protect salmon, steelhead and shad. By letter dated May 24, 1991, State Board staff advised CSPA, DFG and other interested parties that State Board staff is completing a final report of its investigation of the CSPA complaint following receipt of the recent DFG study. The State Board intends to hold a hearing later this year which will examine the issues concerning long-term fishery protection requirements in the Yuba River and other issues raised by the CSPA complaint.

Although the State Board intends to closely review fishery protection requirements on the Yuba River, we believe that the proper forum to do so is a publicly noticed hearing where interested parties have the opportunity to submit technical information and exhibits prior to the hearing and to examine the exhibits and testimony of other parties. Based on the record developed at the hearing, the State Board can take whatever steps are appropriate to provide long-term protection to the Yuba River fishery.

The State Board's obligation in the present proceeding, however, is much more limited. With respect to fish and wildlife, Water Code Section 1727 provides that upon receipt of notification of a proposed temporary change, the State Board shall make an evaluation sufficient to determine that the "proposed temporary change will not unreasonably affect fish, wildlife or other instream beneficial uses." The State Board is not required to determine that no species of fish are being adversely impacted by water diversions. Rather, the focus is on whether the proposed temporary change and transfer will unreasonably affect fish and wildlife.

In the present case, the State Board has no information, nor has CSPA provided any, to establish that the proposed transfer will unreasonably affect fish and wildlife in the Yuba River. To the contrary, the quantity of water involved is relatively small compared to expected flow in the months for which maximum temperature requirements were specified. Therefore, any impact of the transfer on fish and

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wildlife is likely to be undetectable.¹ To the extent that the transfer has any effect, the increased flow in the Yuba River due to the transfer may help to maintain lower water temperatures. Under the circumstances, DFG advised the State Board that specifying water temperature goals, rather than requirements, would be an appropriate procedure with respect to the YCWA-NAPA transfer. The conditions specified in the March 27, 1991 order were revised in the subsequent order entered on April 19, 1991. The April 19 order directs YCWA to make its "best faith efforts" to meet the temperature goals specified in the order, but does not require the release of additional water to maintain those temperatures.

Under the circumstances presented by this transfer, we conclude that the April 19 order was appropriate and should not be modified. In so finding, however, we express no opinion with respect to the general subject of appropriate long-term water temperature requirements in the Yuba River. Our conclusions on that subject

¹ As CSPA notes in its petition for reconsideration, the State Board has previously expressed its concern about the need for an assessment of potential cumulative adverse impacts on the Sacramento-San Joaquin Delta fishery due to temporary water transfers which increase Delta exports. (State Board Order WR 89-20.) Although the North Bay Aqueduct intake utilized for the present transfer is within the legal boundary of the Delta, diversions into the North Bay Aqueduct are protected by a more effective fish screen than is present in the southern Delta. Thus, there is less of a problem with entrainment. In addition, diversions into the North Bay Aqueduct do not create the reverse flow problems which exist in the southern Delta. In view of these differences, the potential for an adverse cumulative impact from limited diversions into the North Bay Aqueduct is much less than the potential impact from cumulative diversions in the southern Delta.

must await receipt and review of the evidence which will be presented at the upcoming hearing on appropriate fishery protection requirements in the Yuba River.

5.2 Procedure for Approval of Temporary Changes Involving a Transfer of Water

CSPA's petition questions the propriety of revising the conditions of approval of the YCWA-NAPA transfer without providing public notice and the opportunity to comment prior to entry of the order. In response, we note that Water Code Sections 1725 through 1730, which govern temporary changes involving a transfer of water, contain no requirement for public notice and comment prior to approval.

In many instances, the State Board has solicited comments prior to approving proposed water transfers in order to acquire the information necessary to evaluate the proposed transfer. In this instance, however, there was sufficient information available to make the statutory findings on the present transfer without soliciting public comment.

CSPA also objects to the procedure by which a designated State Board employee, rather than the State Board itself acts upon petitions for temporary changes

involving water transfers. In response, we note that it is a long-standing practice of the State Board and most other administrative agencies to delegate some of their statutory functions to various employees. The number of actions required of many agencies and the limited time within which action often is necessary makes delegation of authority a practical necessity.

The legal basis for the State Board to delegate authority to a deputy or other authorized person is provided by Water Code Section 7 which authorizes the delegation of authority granted by the Water Code except where expressly prohibited. There is no provision in the Water Code prohibiting the State Board from delegating its authority to approve temporary changes involving a transfer of water.

In cases where the necessary findings are made and other statutory requirements are met, the State Board has delegated authority to Walter G. Pettit to approve petitions for temporary changes involving a transfer of water. (State Board Resolution No. 91-21.) The resolution delegating authority to Mr. Pettit provides that the authority may be redelegated to a senior member of the State Board staff to be exercised in Mr. Pettit's absence. In the present case, the March 27 order signed by Mr. Pettit, and the April 19

order signed in Mr. Pettit's absence by Roger Johnson, Assistant Division Chief for the Division of Water Quality and Water Rights, both comply with the terms of the delegation resolution.

In summary, we conclude that the State Board's procedure complies with statutory requirements governing temporary changes involving water transfers and that the established procedure was duly followed in this instance.

6.0 CONCLUSION

The record indicates that the statutory requirements governing the temporary transfer of water from YCWA to NAPA have been satisfied and that State Board staff followed applicable procedures in approving the transfer subject to the conditions in the March 27, 1991 order as amended by the April 19, 1991 order. Consequently, we conclude that the CSPA petition for reconsideration should be denied.

Although we conclude that approval of the temporary transfer between YCWA and NAPA was appropriate, we believe that the CSPA petition raises several issues concerning long-term fishery protection requirements on the Yuba River which warrant further consideration in a publicly noticed evidentiary hearing to be held later

this year. That hearing will provide an opportunity to address CSPA's concerns regarding protection of steelhead trout, salmon, and American shad in the Yuba River as well as legal requirements applicable to YCWA's operation of New Bullards Bar Reservoir.² The hearing will also provide an opportunity to consider DFG's recently released report and recommendations regarding management of the Yuba River fishery.

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² CSPA has alleged that, under the term of YCWA's Davis-Grunsky Act agreement with the Department of Water Resources, YCWA incurred a legal obligation with respect to water temperatures in the Yuba River. The subject of appropriate water temperatures in the Yuba River and YCWA's obligations to help maintain those temperatures can be addressed at the upcoming hearing.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration filed by the California Sportfishing Protection Association dated May 3, 1991 is denied.

CERTIFICATION

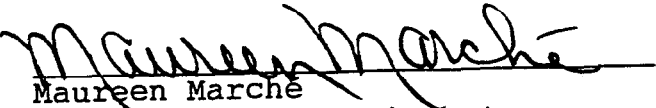
The undersigned, Administrative Assistant to the State Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 18, 1991.

AYE: W. Don Maughan
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None


Maureen Marche
Administrative Assistant
to the Board