

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 99 - 08

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In the Matter of Application 29664,  
**Garrapata Water Company:**  
Extraction of Water by Garrapata Water Company  
from the Alluvium of the Valley of Garrapata Creek  
in Monterey County, California

**GARRAPATA WATER COMPANY**

Applicant,

**DEPARTMENT OF FISH AND GAME,**

Protestant,

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SOURCE: Garrapata Creek Subterranean Stream

COUNTY: Monterey

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**ORDER DENYING PETITIONS FOR RECONSIDERATION**

BY THE BOARD:

**1.0 BACKGROUND**

On June 17, 1999, the State Water Resources Control Board (SWRCB) adopted Water Rights Decision 1639 (D-1639). In D-1639, the SWRCB concluded that:

- "1. The water in the alluvium of the valley of Garrapata Creek is part of a subterranean stream flowing through a known and definite channel.
- "2. The diversion of water from the Garrapata Creek Subterranean Stream is within the permitting authority of the SWRCB.
- "3. The project described in the Company's [Garrapata Water Company] Application 29664 is not exempt from CEQA [California Environmental Quality Act].
- "4. If the Company were to modify its project to limit the amount of water in its application to existing use, the project may be exempted from CEQA under the categorical exemption for existing facilities."

On July 15, 1999, the California Department of Fish and Game (DFG) filed a petition for reconsideration of D-1639 pursuant to California Code of Regulations, title 23, sections 768 and 769. On July 19, 1999, California Trout submitted a letter to the Chairman of the SWRCB in which it stated that it has two "concerns" regarding D-1639. It is not clear whether California Trout's letter is meant to be considered as a petition for reconsideration or a letter in support of DFG's petition.

## **2.0 THE LAW GOVERNING RECONSIDERATION**

Water Code section 1122 provides for reconsideration of SWRCB decisions upon the SWRCB's own motion or upon petition filed within 30 days of adoption of the SWRCB's decision.

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. According to section 769, petitions for reconsideration shall contain the following:

- "1. Name and address of the petitioner.
- "2. The specific board action of which petitioner requests reconsideration.
- "3. The date on which the order or decision was made by the board.
- "4. The reason the action was inappropriate or improper.
- "5. The specific action which petitioner requests.
- "6. A statement that copies of the petition and any accompanying materials have been sent to all interested parties."

Subdivision (b) of section 769 requires that if reconsideration is based in whole or in part on an argument that there is relevant evidence that is not in the hearing record, the petition must include an affidavit or declaration under penalty of perjury which states that new evidence is available that could not have been presented and the reason it was not presented. The petition shall also include a general description of the evidence and of the facts to be proved.

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 which 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 decision, deny the petition, set aside or modify the decision, or take other appropriate action.

### **3.0 CALIFORNIA TROUT'S LETTER**

If the letter submitted by California Trout is a petition for reconsideration, it is defective because it does not comply with the requirements set forth in California Code of Regulations, title 23, section 769. California Trout's letter does not state the specific action of which it requests reconsideration (§ 769(a)(2)), the reason the action was inappropriate or improper (§ 769(a)(4)), and the specific action which it requests (§ 769(a)(5)).

The letter states two "concerns:"

1. D-1639 "is based on the premise that ignorance of the law in some way provides immunity to those who divert the waters of the State of California;" and
2. D-1639 sets a precedent that because the Company claimed ignorance of the law, the SWRCB has waived the need for a water permit and CEQA evaluation.

This statement of "concerns" does not allege any of the bases for reconsideration specified in section 768, unless the statement were construed to request reconsideration based on an error in law. However, the letter does not include a statement of points and authorities, as is required

under subdivision (c) of section 769 for a petition which claims an error in law, and the letter does not include any other elaboration or supporting argument that would explain the legal basis for the "concerns" stated in the letter. Nor is there anything in D-1639 that would provide a basis for California Trout's concerns.

D-1639 addresses the need for a permit for the Company's diversion, concluding that the diversion is within the permitting authority of the SWRCB, and addresses environmental review procedures applicable to the SWRCB's review of the Company's application for a permit.

D-1639 was issued in the context of a permitting proceeding, not an enforcement proceeding to impose penalties for the Company's unpermitted diversion. Nothing in D-1639 would support a claim that if the SWRCB were to initiate enforcement proceedings in response to an unauthorized diversion, as authorized by section 1052 of the Water Code, either the diverter's ignorance of the requirement for a permit or the filing of an application once the diverter became aware of the requirement would immunize the diverter from penalties for diversions that occurred before a permit is issued. Nor does D-1639 waive the requirement for a permit or waive any applicable requirement of CEQA. The Company's diversion is subject to the permitting authority of the SWRCB and a permit is required to lawfully divert water from the Garrapata Creek Subterranean Stream.

The SWRCB is processing the Company's Application 29664. The SWRCB's application processing procedure includes compliance with any applicable requirements of CEQA. If the Company modifies its project so as to fit one of CEQA's categorical exemptions, then the SWRCB's review of that project in accordance with the categorical exemption involves the application of CEQA in accordance with its terms, not a waiver of CEQA.

If California Trout's letter is meant to be a petition for reconsideration, it should be denied for failure to comply with the procedural requirements of California Code of Regulations, title 23, sections 768 and 769.

#### 4.0 DFG'S PETITION

In its petition for reconsideration, DFG claims that in D-1639, the SWRCB went "beyond the scope of the hearing on which it is based to make findings of fact and law regarding a hypothetical application that was not only not the subject of the hearing, but also is not yet before the Board for a decision." DFG further claims that it was prevented from having a fair hearing because it did not have the opportunity to "fully address the potential effects of this hypothetical application on the public trust resources in Garrapata Creek" or to present evidence on the "increase in diversions represented by" the "hypothetical application." These claims invoke two of the causes for reconsideration. DFG contends that discussion of the applicability of CEQA to a modified project was an "error in law." (Cal. Code Regs., tit. 23, § 768, subd. (d).)<sup>1</sup> DFG further contends that it was denied a fair opportunity to address issues involving a modified project. (See *id.*, subd. (a) (irregularity in the proceedings that denies a party a fair hearing).)

#### 4.1 DFG's Claim That It Was an Error in Law to Address Potential Modifications to the Project

D-1639 includes a discussion regarding how the Company's project could be modified to qualify for a categorical exemption from CEQA as an existing facility. D-1639 does not contain findings of fact and law regarding a hypothetical application which is not before the SWRCB, as alleged by DFG.

In contrast to most SWRCB decisions, D-1639 does not amount to final action on a water right application. The SWRCB has not adopted a decision which commits it to a definite course of action with regard to Application 29664 nor has the SWRCB made a commitment to issue a permit for the project described in Application 29664. Rather, the SWRCB held a hearing and adopted D-1639 to make preliminary determinations as part of ongoing proceedings to review Application 29664.

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<sup>1</sup> The legal error alleged by DFG's petition is a procedural one. DFG alleges some of the discussion in D-1639 addresses an issue that was not properly before the SWRCB and should not have been addressed. The DFG petition does not address the substantive issue whether, assuming that it was legally permissible for the SWRCB to address the issue in D-1639, the SWRCB's conclusions concerning the applicability of CEQA to potential modifications of the project are legally correct.

DFG states in its petition that the purpose of the hearing was to address Application 29664, and that in discussing potential modifications to the project, D-1639 addresses "a completely new application." In fact, a modification of the project to reduce the amount diverted would involve an amendment to Application 29664, not a completely new application, and the amendment is one that could reasonably be anticipated. The SWRCB routinely allows project proponents to amend their applications to reduce the rate, season or amount proposed to be diverted or to make similar modifications that would not have impacts on prior right holders or the environment beyond those that would result from the project as set forth in the notice of the application.<sup>2</sup>

There is no legal rule that prevents an SWRCB decision or order from considering the effect of modifications to the project as proposed by the applicant, especially where, as here, the SWRCB is not taking final action on the application and amendment of the application is reasonably foreseeable. By discussing how modifications to the proposed project might affect the SWRCB's conclusions, the decision or order may serve to help explain the legal basis for its conclusions, may serve to distinguish situations where those conclusions may not apply, and may provide guidance for further processing of the applications under consideration.<sup>3</sup>

A discussion of potential modifications of the project to avoid or mitigate potential adverse environmental impacts, instead of limiting discussion to the project exactly as it is proposed in an application, is particularly appropriate. Encouraging applicants to modify their projects to avoid adverse environmental impacts, thereby avoiding the need for environmental documentation to review the impacts of features the applicant eliminates from the proposed project, furthers CEQA's goal of avoiding adverse environmental impacts while at the same avoiding

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<sup>2</sup> Cf. Cal. Code Regs., tit. 23, § 698 (allowing the SWRCB to reduce the proposed diversion); *Id.* § 699 (prohibiting increases in the proposed diversion). The procedures for proposed changes in point of diversion, place or use or purpose of use, where those changes are proposed after notice of an application, are set forth in Article 15 (commencing with section 791) of Division 3 of title 23 of the California Code of Regulations.

<sup>3</sup> DFG argues that courts will not issue opinions absent an actual case in controversy. D-1639 unquestionably involved an actual case in controversy. The applicant disputed both the requirement for a permit and the applicability of CEQA, and SWRCB staff and DFG took positions in opposition to the applicant's claims. When an actual case in controversy is presented, a court's opinion may not necessarily be limited to the narrowest grounds possible based on the precise facts before it. To explain the basis of its decision or for further guidance to the trial court, judicial opinion may state its holding more broadly or may indicate how different facts might dictate a different result. While such guidance and explanation may be dicta, it is within the authority of the court, and may help assure that cases are decided in a fair, logical, and consistent manner.

unnecessary paperwork, delay, and cost. (See Pub. Resources Code § 21002; Cal. Code Regs., tit. 14, § 15006.)

Including a discussion of potential modification of the project to avoid adverse impacts to the environment and eliminate the need for environmental documentation was pertinent to the application and issues before the SWRCB in D-1639 and did not constitute an error in law.

**4.2 DFG's Claim That It Was Prevented from Having a Fair Hearing Because It Did Not Have the Opportunity to Fully Address the Potential Effects of the Modified Project on the Public Trust Resources or to Present Evidence on Amount of Diversion Under the Modified Project**

Insofar as DFG's petition for reconsideration concerns the opportunity to fully address the effect on fish, wildlife, or other instream beneficial uses of any diversions permitted by the SWRCB based on Application 29664, and to propose conditions to protect those public trust uses, DFG's petition is premature. As discussed above, D-1639 involves only selected preliminary issues--involving whether the SWRCB has jurisdiction to process the application and a preliminary determination as to the applicability of CEQA's environmental documentation requirements--as part of the SWRCB's ongoing processing of the application. These preliminary issues addressed in D-1639 do not include a determination as to what conditions should be imposed to protect public trust uses. Moreover, as D-1639 points out, the SWRCB's authority and responsibility to apply the public trust doctrine does not depend on the applicability of CEQA. Even if the project is modified so as to qualify for a categorical exemption under CEQA, the SWRCB retains authority to deny the application or condition the permit as necessary to protect public trust uses.

Application 29664 was filed by the Garrapata Water Company to divert 72,000 gallons per day year round from Garrapata Creek Subterranean Stream with a limitation of 81 acre-feet per annum (afa). Application 29664 is a minor protested application as defined in Water Code section 1348 and is subject to procedures specified in Water Code sections 1345-1347.<sup>4</sup> In accordance with Water Code section 1345, a field investigation was held on January 27, 1997,

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<sup>4</sup> The procedures for processing minor protested applications were amended by SB 849, Stats. 1997, ch. 323, effective January 1, 1998.

pursuant to a Notice of Field Investigation dated December 23, 1996. The purpose of the field investigation was to collect information and evidence relating to Application 29664 and DFG's protest to the application. DFG was given an opportunity to present evidence during and after the field investigation. A representative of DFG attended the field investigation and had the opportunity to fully address the potential effects of diverting up to 81 cfs from the Garrapata Creek Subterranean Stream. The Division of Water Rights has not yet issued a decision based on the field investigation. When that decision is issued, if DFG believes that the proceedings on which it is based failed to provide an opportunity to present evidence on impacts to public trust resources, or that the decision itself fails to adequately protect those resources, DFG may file a petition for reconsideration at that time.

Insofar as DFG's petition for reconsideration concerns the opportunity to make its case as to the applicability of CEQA, we conclude that DFG had a fair opportunity to present its case. DFG had the opportunity to present evidence regarding what the Company's current use is, what the future use may be, and what the effects of those diversions are on public trust resources. Among the issues stated in the Notice of Hearing are the following:

- "B (i) (b). How much water is the Company extracting from the alluvium of the valley of Garrapata Creek at the present time?"
- "B (i) (c). How much water does the Company intend to extract from the alluvium of the valley of Garrapata Creek in the future?"
- "B (ii). Does this project have the potential to adversely affect threatened or endangered species?"

DFG clearly had a fair opportunity to present evidence regarding the Company's existing diversion. It cannot fairly be argued that modifying the project to limit the Company's diversion to existing use would somehow have a greater impact on public trust uses than the higher limit on total diversions which the Company had proposed in its application. Nor does DFG identify any evidence it would have introduced at the hearing if DFG had anticipated that D-1639 would address potential modifications to the project. (See Cal. Code Regs., tit. 23, § 769, subd. (b).)



It should also be noted that, as stated in D-1639, any findings concerning the applicability of CEQA must be based upon the facts in the record at the time the SWRCB makes its decision to issue a permit and any finding in D-1639 which finally determines the applicability of CEQA would have been premature. The observations in D-1639 concerning the applicability of CEQA are therefore stated as tentative conclusions. With respect to a modified project, D-1639 concludes: "If the Company were to modify its project to limit the amount of water in its application to existing use, the project may be exempted from CEQA under the categorical exemption for existing facilities." (Emphasis added.)

Although DFG may not have anticipated how the SWRCB would address the applicability of CEQA in D-1639, that does not amount to an unfair hearing. As stated in section 4.1 of this order, there is no hypothetical application being considered by the SWRCB in D-1639. Application 29664 is the only application which was the subject of both the field investigation and the hearing, and it is reasonably foreseeable that the application could be amended to reduce the amount of diversion. DFG had an opportunity to present evidence as to the amount of existing and potential diversions, and the impacts of those diversions on public trust resources. DFG's claim that it was prevented from having a fair hearing because it did not have the opportunity to present evidence on the potential effects of a modified project on public trust resources in Garrapata Creek or the amount of diversion under a modified project is not correct.

## 5.0 CONCLUSION

The SWRCB concludes the following:

1. If the letter submitted by California Trout is a petition for reconsideration, it should be denied.
2. The petition for reconsideration filed by DFG should be denied.

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**ORDER**

IT IS HEREBY ORDERED THAT if the letter submitted by California Trout is a petition for reconsideration, it is denied. It is further ordered that the petition for reconsideration filed by DFG is denied.

**CERTIFICATION**

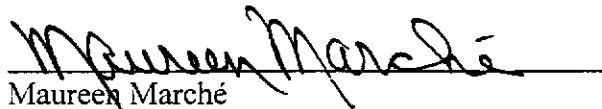
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 1, 1999.

AYE: James M. Stubchaer  
Mary Jane Forster  
John W. Brown  
Arthur G. Baggett, Jr.

NO: None

ABSENT: None

ABSTAIN: None

  
Maureen Marché  
Administrative Assistant to the Board