

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2000 - 04

---

In the Matter of the Petition for  
Reconsideration of Order Rejecting and Canceling  
Applications 30647 and 30648 for Failure to  
Submit Information in Accordance with  
Water Code Section 1275

---

SOURCE: Owens Creek

COUNTY: Merced

---

**ORDER DENYING PETITION FOR RECONSIDERATION**

**1.0 BACKGROUND**

On September 25, 1997, the Green House Partnership (Applicant) filed two applications to appropriate unappropriated water from Owens Creek, tributary to the San Joaquin River in Merced County. In Application 30647, the Applicant proposes to divert up to a maximum of 3,000 acre-feet per annum (afa) to be diverted at two points of diversion at rates not to exceed 10 and 23 cubic feet per second (cfs) respectively from September through February for wildlife enhancement and recreation. In Application 30648, the Applicant proposes to divert up to a maximum of 5,000 afa to be diverted at the same points of diversion and at the same rates of diversion specified in Application 30647 from March through November for irrigation and stockwatering.

Notice of both applications was provided in accordance with Chapter 3 of Part 2 of Division 2 of the Water Code (commencing with section 1300.) Eight parties filed protests to both applications alleging injury to prior rights and adverse environmental impacts caused by the proposed projects specified in the applications.

By letter dated September 16, 1998, the Applicant requested an extension of time to October 31, 1998 to respond to the protests. By letter dated October 14, 1998, staff of the Division of Water Rights (Division) of the State Water Resources Control Board (SWRCB) authorized an extension of time to October 31, 1998, to respond to the protests. To date, the Applicant has failed to respond to the protests.

By letter dated April 12, 1999, Division staff required the Applicant to submit a detailed workplan by October 1, 1999, for compliance with the required actions set forth in the letter. The required actions include submission of a rare plant and animal survey, recommended mitigation measures, water availability analysis, and documentation of attempts to resolve the protests. The workplan has not been submitted. The required actions set forth in the April 12<sup>th</sup> letter have not occurred.

By letter dated July 15, 1999, the Applicant requested an extension of time of one year in which to comply with the requirements of the April 12<sup>th</sup> letter. The Applicant claimed that the Bay-Delta proceedings would be completed in approximately one year and "the testimony and the final decision by the Board will greatly impact how the applicant decides to proceed on these pending applications." By letter dated August 10, 1999, the Division denied the request for extension of time and reiterated the October 1, 1999, deadline for submitting the workplan required by the April 12<sup>th</sup> letter. In its letter, the Division stated that there is no guarantee that the Bay-Delta proceedings would be complete in one year or that they will have any bearing on the two applications.

On February 29, 2000, the Chief of the Division issued an Order Rejecting and Canceling Applications 30647 and 30648 (Order) for failure to "submit information in accordance with section 1275 of the Water Code or to show cause why further time should be allowed." (Water Code sections 1275 and 1276, SWRCB Resolution No. 99-031.) On March 17, 2000, the Applicant filed a petition for reconsideration (petition) of the Order.

## 2.0 THE LAW GOVERNING RECONSIDERATION

Water Code section 1122 provides for reconsideration of SWRCB decisions or orders upon the SWRCB's own motion or upon petition filed within 30 days of adoption of the SWRCB's decision or order. Section 1122 applies to orders issued by the Chief of the Division of Water Rights pursuant to authority delegated to him by the SWRCB.

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 SWRCB's files, 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 affidavit 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.

### 3.0 APPLICANT'S PETITION FOR RECONSIDERATION

The petition filed by the Applicant is defective for failure to state the reason the Order was inappropriate or improper and for failure to state that copies of the petition have been sent to all interested parties. (Cal. Code Regs., title 23, § 769, subd. (a) (4), (6).) Further, the petition fails to state a valid grounds for reconsideration. (Cal. Code Regs., title 23, § 768.) Therefore, the petition should be denied.

The Applicant claims that there is new information that is or will be available and that an extension of time is required to enable the Applicant to comply with the requirements set forth in the Division's April 12<sup>th</sup> letter. If the SWRCB is to construe the Applicant's claim as coming within the cause set forth in California Code of Regulations, title 23, section 768, subd. (c), then an affidavit or declaration under penalty of perjury which states that new information is available that could not have been presented in time to comply with the requirements set forth in the April 12<sup>th</sup> letter should have been submitted. (Cal. Code of Regs., title 23, § 769, subd. (b).) The affidavit should have included a general description of the new information and what this new information would show. (*Id.*) The petition is defective for failure to submit the required affidavit. Therefore, the petition should be denied.

Even if the petition complied with the requirements set forth in sections 768 and 769, the Applicant fails to state why it could not comply with the October 1, 1999 deadline for submittal of the workplan or the October 31, 1998 deadline to respond to the protests filed in opposition to the two applications. Further, the Applicant provides no assurance that it will now diligently comply with the requirements set forth in the April 12<sup>th</sup> letter.

In its petition, the Applicant states:

“Changes implemented by the Merced Irrigation District (MID) and the Merced National Wildlife Refuge (Refuge) upstream from the Green House Ranch (Green House)

proposed diversion points on both "Owens Creek" and "No Name Drain" have prevented Green House from compiling accurate current flow data in order to defend the current applications. Projects are in progress or near completion that will affect the future flows in both channels."

In its petition, the Applicant states that MID implemented its changes in the 1999 irrigation season but that data was compiled for eight water years between 1989 and 1997. The Applicant provides no reason why the "historic" data could not have been submitted to the SWRCB prior to the October 1, 1999, deadline with an explanation of the likely hydrologic changes expected from MID's system improvements. Nor does the Applicant explain why it did not request that MID provide the new data from the 1999 irrigation season in time to comply with the deadline. The workplan could have included a time schedule for obtaining and analyzing the new data.

In its petition, the Applicant states that the Refuge completed its irrigation system improvement project in September 1999. Again, the Applicant does not explain why it failed to request information on the operation of the new irrigation system prior to the deadline for submitting information to the SWRCB. The workplan could have included a time schedule for obtaining information and analyzing whether and how the Refuge's irrigation system improvement project would impact the projects proposed in Applications 30647 and 30648.

#### **4.0 CONCLUSION**

The SWRCB concludes the following:

1. The petition submitted by the Applicant is defective because it fails to comply with the requirements set forth in California Code of Regulations, title 23, sections 768 and 769.
2. The Applicant offers no explanation for failure to submit the workplan required by the Division's letter dated April 12, 1999.
3. The Applicant provides no assurance that it will diligently comply with the requirements set forth in the April 12<sup>th</sup> letter.
4. The petition should be denied.

**ORDER**

IT IS HEREBY ORDERED THAT the petition for reconsideration filed by Green House Ranch Partnership is denied.

**CERTIFICATION**

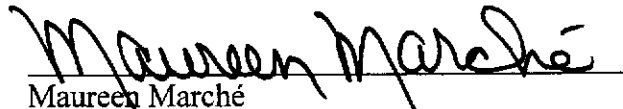
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 18, 2000.

AYE: Arthur G. Baggett, Jr.  
Mary Jane Forster  
John W. Brown  
Peter S. Silva

NO: None

ABSENT: None

ABSTAIN: None

  
Maureen Marché  
Administrative Assistant to the Board