

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0038-EXEC

In the Matter of the Petition for Reconsideration by
California Salmon and Steelhead Association
Regarding Order WR 2008-0030-DWR
Which Approved a Temporary Transfer of up to 10,000 Acre-Feet by

South Fork Feather Water and Power Agency

Permits 1267 and 2492 (Applications 1651 and 2778)

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

California Salmon and Steelhead Association (CSSA or Petitioner) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights (Division) order approving Order WR 2008-0030-DWR, a temporary transfer of up to 10,000 acre-feet of water from South Fork Feather Water and Power Agency to several state water contract agencies. CSSA requests the State Water Board to rescind the approved water transfer pending mitigation of prior fish losses at the "state pumps"¹ and the reduction or cessation of fish losses at those pumps. The State Water Board Executive Director finds that the petition fails to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and denies CSSA's petition for reconsideration.

¹ Based on review of CSSA's earlier comments, it appears that the organization's concerns regarding the "state pumps" refer to the Department of Water Rights' Clifton Court Forebay diversion facility, which is one of the new points of diversion temporarily added to Permits 1267 and 2492. However, the analysis in this order applies equally if "state pumps" refer also to the Barker Slough Pumping Plant, the other point of diversion added.

2.0 RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a decision or order within 30 days of issuance, on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror 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 State Water Board's regulations. (*Id.*, section 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also 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).)

State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. The Executive Director's consideration of a petition for reconsideration falls within the scope of the authority delegated under Resolution No. 2002-0104, unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the decision or order, or take other appropriate action.

The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedure Act. (State Water Board Order WR 96-1, at p. 17, fn. 11.)

3.0 FACTUAL BACKGROUND

On March 28, 2008, South Feather Water and Power Agency filed with the State Water Board a petition for temporary change under Water Code section 1725, et. seq. The petition requested permission to transfer up to 10,000 acre-feet of water from the watershed of the South Fork Feather River to several state water contracting agencies.

The petition was noticed by mail and publication in late April 2008, and three organizations, CSSA, Butte Environmental Council, and California Sportfishing Protection Alliance, submitted timely comments.

On July 3, 2008, the State Water Board Deputy Director for Water Rights issued an order approving the requested change with specific conditions (Order WR 2008-0030-DWR). CSSA's petition for reconsideration of Order WR 2008-0030-DWR was timely received on July 17, 2008.

4.0 DISCUSSION

Procedural Deficiencies of Petition

The submitted petition does not meet the requirements for a valid petition for reconsideration. (See Cal. Code Regs., tit. 23, § 769.)

The petition does not contain a statement that copies of the petition and any accompanying materials have been sent to all interested parties. (See Cal. Code Regs., tit. 23, § 769, subd. (a)(6).) Under the heading "certificate of service," the petition lists only State Water Board staff and chair and refers to an e-mail "cc" list. Since the e-mail "cc" list does not identify affiliations for the persons copied, it cannot be shown that the petition was served to California Department of Fish and Game, the proposed transferees, the boards of supervisors of the counties where the water would be used, the California Department of Water Resources, or to the other protestants. The purpose of requiring proof of service for petitions is to ensure that other interested parties can determine what action, if any, should be taken to protect their interests. Petitioner's failure to provide a copy of the petition to other interested parties has denied them such fair opportunity to respond.

In addition, the petition fails to include a statement of points and authorities in support of the legal issues raised in the petition. (See Cal. Code Regs., tit. 23, § 769, subd. (c).) The petition does not respond to the legal reasoning in the order which addressed CSSA's concerns. A memorandum of points and authorities should contain a statement of facts, a concise statement

of law, evidence and arguments relied upon, and a discussion of the statutes, cases, or other authority cited in support of the position advanced. (See Cal. Rules of Court, Rule 3.1113.) Where, as here, a petitioner seeks reconsideration of an order that included legal reasoning in response to the petitioner's concerns, the points and authorities should include a response to the legal reasoning in the order. The petition does not meet these requirements.

Because the petition fails to meet the requirements for a valid petition for reconsideration, the petition is denied. (See, e.g., State Water Board Order WR 2004-04 at p. 4)

Allegation of Unreasonable Harm to Fish, Wildlife or Other Instream Beneficial Uses

Even if the petition satisfied the requirements of section 769 of the regulations, it should be dismissed for failure to raise substantial issues related to the causes for reconsideration.

Water Code section 1727, subdivision (b), requires the State Water Board to approve a temporary change if a preponderance of the evidence shows that the proposed temporary change will neither injure any legal user of water nor unreasonably affect fish, wildlife or other instream beneficial uses. Water Code section 1727, subdivision (e), prohibits the State Water Board from denying or conditioning temporary changes "to avoid or mitigate impacts that are not caused by the temporary change."

CSSA's central allegation is that Order WR 2008-0030-DWR does not comply with California Water Code section 1727 because the transfer would unreasonably affect fish species at the state pumps. CSSA's petition states that Department of Water Resources records indicate heavy fish losses at the state pumps "with and without" water transfers, and it asserts that these losses are unreasonable "with or without water transfers."

CSSA raises a generalized concern regarding the operation of the state pumps. The organization fails to allege that the temporary transfer will have any effect that would not occur in the absence of the transfer, and concedes that its concerns exist regardless of the temporary transfer.

Under Water Code section 1727, subdivision (d), the State Water Board may not limit temporary transfers based on impacts caused by actions other than the temporary transfer itself. Therefore, CSSA's concerns regarding the state pumps' operations fail to raise substantial issues related to the causes for reconsideration enumerated in California Code of Regulations, title 23, section 768.

Other Allegations

CSSA also makes general allegations that the State Water Board and its staff are "out of control" and "corrupt." The petition relates these allegations to the effect of state pump operation of fish species, discussed above, and to a previous decision not at issue in the approved temporary transfer. Therefore, these allegations also fail to raise substantial issues for reconsideration.

5.0 CONCLUSION

The petition submitted by CSSA fails to meet the requirements for a legally adequate petition for reconsideration, and fails to raise substantial issues related to the causes for reconsideration. For these reasons, the State Water Board refuses to reconsider Order WR 2008-030-DWR.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

Dated: **SEP 16 2008**



Dorothy Rice
Executive Director