

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2014-0026-EXEC

In the Matter of Petition for Reconsideration of
SAMUEL AND MARGARET BAKER
Regarding Issuance of Water Right Permit 21305 (Application 30860)

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

On January 18, 2013, the State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division) issued water right Permit 21305 to Samuel and Margaret Baker (Baker or Petitioners) based on Application 30860, for appropriation of water from an Unnamed Stream tributary to Dago Creek thence Rancheria Creek thence the Navarro River, The Division received Application 30860 on April 9, 1999, after an enforcement sweep of the Navarro River watershed identified a pond on Petitioners' property for which Petitioners did not have a water right. Petitioners filed a petition for reconsideration, which was received by the State Water Board on February 19, 2013. Petitioners request an order from the State Water Board stating that a water right permit is not necessary for Petitioners' pond. Petitioners also request that their petition be considered by the Board in an evidentiary hearing.

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. 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, the Executive Director's consideration of a petition for reconsideration of a Division order issuing a permit falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

2.0 GROUNDS FOR RECONSIDERATION

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs. tit. 23, § 768.)³ The legal bases for reconsideration are: (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; or (d) error in law.

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. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question 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

In June 1998, the Division conducted an enforcement sweep of the Navarro River watershed, identifying water diversions and storage facilities without bases of right to divert or store water. The subject pond on Petitioners' property was identified as requiring an appropriative water right. On June 25, 1998, Division staff conducted an inspection of Petitioners' property. Staff concluded that the subject pond on Petitioners' property was storing water subject to the State Water Board's permitting authority and without a current basis of right. Petitioners filed water right Application 30860 on November 10, 1998. On March 31, 1999, Division staff contacted the Petitioners to discuss their project and accordingly made adjustments to the contents of the application, which was subsequently accepted and assigned a priority date of April 9, 1999. Application 30860, as originally filed and adjusted, requested the right to collect to storage 20 acre-feet per annum (afa) during the season of November 1 of each year through March 31 of the succeeding year from an Unnamed Stream tributary to Dago Creek thence Rancheria Creek thence the Navarro River. The purposes of use were listed as Irrigation, Domestic and Frost Protection.

³ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

Application 30860 was publicly noticed on July 14, 2000. Protests were received from Daniel Myers, the Navarro Watershed Protection Association, and the National Marine Fisheries Service (hereafter Protestants).

During the intervening period while Application 30860 was processed, the Petitioners twice indicated that they did not agree that their diversion of water was subject to the State Water Board's permitting authority. On March 30, 2001, the Petitioners' legal counsel indicated this disagreement and offered that they may be entitled to divert under a claim of riparian right, however they chose to defer discussion on the State Water Board's permitting authority in order to meet their requirement to answer the protests in a timely fashion. The Petitioners retained the services of an engineering firm to serve as an authorized agent for proceedings regarding Application 30860, who in turn reviewed the available records and submitted a letter dated June 9, 2005, arguing again that the diversion of water was not subject to the State Water Board's permitting authority. In response, Division staff submitted a letter dated July 12, 2005, indicating that the information provided did not persuade the Division that it should change its determination that the diversion of water was subject to the State Water Board's permitting authority. The letter offered that the Petitioners could submit a request to cancel Application 30860, but that if they continued to divert they risked enforcement action at the discretion of the State Water Board.

Despite the Petitioners' assertions that their diversion of water was not subject to the State Water Board's permitting authority, they continued to diligently pursue processing of Application 30860.

By email dated March 8, 2012, Division staff transmitted a draft permit for Application 30860 to the Petitioners for review and comment. By letter dated March 12, 2012, Division staff transmitted a draft permit for Application 30860 to the Petitioners, the Protestants, and select local, state and federal agencies, requesting that all parties review the draft permit and provide comments within thirty days. By letter dated April 3, 2012, the Petitioners indicated that they accepted the terms contained in the draft permit, but questioned the necessity of a term requiring an erosion control plan.

By emails dated August 15, 2012 and September 5, 2012, Division staff again shared draft permits with the Petitioners. The draft permits contained some changes in formatting and term language, yet otherwise were substantially consistent with the draft permit dated March 8, 2012.

By phone call on December 3, 2012, and email dated December 4, 2012, the Petitioners again questioned whether their diversion was subject to the State Water Board's permitting authority. After subsequent phone and email correspondence on this issue in December and again in January 2013, Division staff indicated to the Petitioners that staff resources were not available to conduct another inspection of the property to revisit whether the diversion of water was subject to the State Water Board's permitting authority. Division staff again offered that the Petitioners could choose to cancel Application 30860.

On January 18, 2013, the Division issued the following: (1) Permit 21305 for Application 30860; (2) an order canceling the three outstanding protests of Application 30860; and, (3) a Notice of Exemption for the project associated with Application 30860 pursuant to the California Environmental Quality Act.

On February 20, 2013, the State Water Board received a petition for reconsideration asking the State Water Board to reconsider, after a hearing, the issuance of Permit 21305 and issue an order stating that a water right permit is not necessary for Petitioners' pond.

4.0 DISCUSSION

4.1 THERE WAS NO IRREGULARITY IN THE PROCEEDINGS, OR ANY RULING, OR ABUSE OF DISCRETION, BY WHICH THE PERSON WAS PREVENTED FROM HAVING A FAIR HEARING

In their petition for reconsideration, Petitioners contend that they were denied notice and fair hearing in Division's issuance of a permit on their application. Specifically, Petitioners' contend that the Division's denial of a third inspection of their property denied them the opportunity question the inspection reports from the prior inspections and to have their concerns heard. This contention does not evidence either an irregularity in the proceedings or any abuse of discretion by which Petitioners were denied a fair hearing.

While an applicant does not, by the act of filing and pursuing an application to appropriate water, forfeit the right to dispute or challenge whether the water applied for is subject to the State Water Board's permitting authority, having done so, the applicant cannot reasonably complain of an irregularity in the proceedings or an abuse of discretion denying a fair hearing when a permit is eventually issued on the application. Where, as here, permit issuance is preceded by multiple inspections and the issue was evaluated in those inspections and in response to later submissions by Petitioners, denial of more site visits and further consideration of the same issue does not support a contention of denial of a fair hearing.

Petitioners suggested, at least as early as March 30, 2001, that their impoundment of water was not subject to the State Water Board's permitting authority. In considering Application 30860, the Division had the benefit of a full record, including reports of two Division staff site inspections as well as all materials provided by Petitioners. As part of the application process, Petitioners submitted a consultant's report which discusses, in part, the issue of the source of water for Petitioners' impoundment. This report supports the Division's conclusions in a number of different places and does not, as characterized by Petitioners, definitively show that Petitioners' pond does not impound water subject to the State Water Board's permitting authority.

4.2 THE ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Petitioners assert that the decision to issue a permit on their application was not supported by substantial evidence. In their petition for reconsideration, Petitioners point to what they believe is substantial evidence supporting a conclusion that their pond does not impound water subject to the State Water Board's permitting authority. The relevant question, however, is whether there is substantial evidence supporting the Division's conclusion, not whether there is also evidence supporting a different conclusion. The Division's file for Application 30860 contains all information upon which Permit 21305 is based. This file includes the inspection reports of two site inspections and all materials submitted by Petitioners and Protestants. Taken together, the evidence in the file supports the Division's decision to issue a permit on Petitioners' application. Petitioners dispute the Division's determination that Petitioners' reservoir impounds water flowing in a natural channel. Specifically, Petitioners point to a Public Trust Resources Evaluation Report prepared for the application by aquatic ecologist Mike Podlech (hereafter "Podlech report"), which determined that the watercourse impounded by Petitioners' pond does not have evidence of historic sediment transport or riparian, wetland, or channel habitat. (Petition, p. 5.)

Pursuant to Water Code section 1201, water flowing in a natural channel is, in general, subject to the State Water Board's permitting authority. Wells A Hutchins, quoting *Weck v. Los Angeles County Flood Control Dist.* (1947) 80 Cal.App.2d 182, 196, notes that "diffused surface waters 'may, without artificial aid, converge so as to form a defined channel and if they would naturally flow therein it would be construed to be a natural watercourse from that point at which the channel begins to take form.'" (Hutchins, *The California Law of Water Rights* (1950) p. 373 (Hutchins).) This necessarily requires a factual determination regarding whether and where diffused waters converge so as to form a defined channel. Hutchins also notes that "the bed and banks are such as are made and are habitually used by the water in passing down the slope of the land. [citing *San Gabriel Valley Country Club v. County of Los Angeles* (1920) 182 Cal. 392, 397]...It is not essential that the banks shall be unchangeable or that everywhere a visible change in the angle of ascent marking the line between bed and banks." (Hutchins, p. 23, citing *Lux v. Haggin* (1886) 69 Cal. 255, 418.) Accordingly, it is whether water habitually gathers and follows a given course without artificial aid that serves as the touchstone for whether a natural watercourse exists.

On the question of what factors may evidence existence of a natural channel, Hutchins cites to the California Supreme Court case *Lux v. Haggin* for the point that a channel "may be worn deep by the action of water, or may follow a natural depression without any marked erosion of soil or rock; or it may be distinguished by a difference in vegetation or otherwise be rendered perceptible." (Hutchins, p. 24, citing *Lux v. Haggin* (1886) 69 Cal. 255, 419.) As applied to Petitioners' contentions, although evidence of historic sediment transport or riparian, wetland, or channel habitat certainly could support a conclusion that a watercourse exists, the lack of such evidence does not conversely require a conclusion that no watercourse exists. The Division reasonably concluded, based on the topography, soil type and average annual rainfall in the area, that the watercourse impounded by Petitioners' dam would not likely be evidenced by significant erosion or riparian vegetation even without the impoundment.

Petitioners contend that no "convergence" of diffused surface water occurs within 1000 feet below the pond, where a spring-fed tributary joins the drainage. (Petition, p. 6.) This contention is belied by the available evidence. Both the Podlech report and the Division's initial investigation report map the path of watercourse from Petitioners' pond. The Podlech report includes photographs, supporting the existence of a "perceptible" watercourse. The spring noted in the Podlech report may in fact provide a greater portion of the water below its

confluence with the watercourse in question, but the inquiry on a petition for reconsideration is whether there is substantial evidence supporting the original conclusion, and in this case the Podlech report can be reasonably construed to support the Division's conclusion that a natural channel begins at or above Petitioners' dam. The question is not whether there is some evidence supporting Petitioners' conclusion, but whether there is substantial evidence supporting the Division's conclusion that a natural channel begins at or above Petitioners' dam.

Mr. Pronsolino contends that he "would not have built his home in its current location if there had been a stream channel above, below, or adjacent to [his] home." (Pronsolino affidavit, para. 9.) Mr. Pronsolino also notes, however, that he "chose its current location because of access to a paved road and power." (*Id.*, at para. 7.) Mr. Pronsolino's statements do not answer the question of whether a watercourse, as the term is used for purposes of the law of water rights, exists at Petitioners' pond. As remarked in the Podlech report, the dam at Petitioners' pond failed several years prior to Petitioners' purchase of their property and "at that time, water flowed from the pond down its presumed historic drainage and flooded the neighboring residence." (Podlech report, p. 6.) The Podlech report noted this "historic drainage" is "intercepted by a berm spanning its entire width" in between the dam and the Pronsolino residence. (*Id.*, p. 4.) It is not clear when this berm was constructed, but, according to the Podlech report, "based on existing topography, this berm appears to have historically been constructed across the swale to protect the downstream residence from flooding or possibly to impound water." (*Ibid.*) Both the Division's inspection report and the Podlech report map the watercourse along essentially the same path from the pond at least as far as this berm. The construction of this berm, whether to protect the downstream property from flooding or to impound water, is further evidence that water converges in this "presumed historic drainage."

The court in *Lux v. Haggin* also noted a distinction between a channel in existence when the diversion occurred that had "disappeared (and ceased to exist) as the result of natural causes" and one that disappeared "as a consequence of any acts of the defendant, or of interference by others." (*Lux v. Haggin* (1886) 69 Cal. 255, 418.) The court understood that some of the common indicia of a watercourse would cease to be present if water were diverted out of the watercourse, but that the watercourse would not thereby lose its character as a watercourse. (*Id.* at p. 419 ["Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on each side. In such case, if water flowed periodically at the portion of the depression, it flowed in a channel, notwithstanding the fact that, the water being withdrawn, the

“distinctive appearances” that it had ever flowed there would soon disappear.”].) As such, it is not sufficient to rely on the absence of marked erosion or sediment transport, or even riparian vegetation, for a conclusion that *necessarily* no watercourse existed when the diversion occurred. Clearly no water habitually flows down the watercourse in question, because of the dam in question and the presence of an alternative spillway. That water flowed down the watercourse mapped by both Division staff and the Podlech report when the dam failed, however, supports a conclusion that a watercourse does in fact exist in that location, beginning at or above Petitioners’ dam.

In regards to whether a defined channel exists above the reservoir, Division staff noted in the initial inspection that “the orchard and dam are quite old and could have obscured a defined channel above and within the reservoir.” The existence of a downstream channel traceable from the reservoir makes it unnecessary to determine exactly what the topography upstream of the reservoir looked like prior to construction of the dam.

Petitioners also argue it is significant that the watercourse in question does not meet the established criteria for the State Water Board’s North Coast Instream Flow Policy (Policy). The fact that the watercourse being impounded by Petitioners’ pond does not fit within the defined categories for stream types in the Policy does not preclude a determination that this particular watercourse is within the State Water Board’s permitting authority. The Policy created new internal definitions of stream types solely for purposes of its own application, and those definitions do not implicate, preempt or replace the longstanding analysis for determining the existence of a watercourse.

4.3 AFFIDAVITS COULD HAVE BEEN PRODUCED PRIOR TO ISSUANCE OF PERMIT

Petitioners contend that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced prior to issuance of the permit in question. As already discussed, Petitioners raised their contention, that their impoundment of water was not subject to the State Water Board’s permitting authority, at least as early as March 30, 2001.

Furthermore, beginning March 12, 2012 (when Petitioners received a copy of the draft permit for Application 30860, with a request to review the draft permit and provide comments within thirty days), the Division provided a number of opportunities for Petitioners to provide this type of information. The affidavits could certainly have been produced earlier.

Moreover, the Division considered evidence largely similar to the statements included in the two affidavits prior to issuance of the permits. The Division's decision is supported by substantial evidence, and there is no reason to believe the Division would have reached a different conclusion if the affidavits had been submitted before issuance of the permit.

4.4 NO ERROR IN LAW

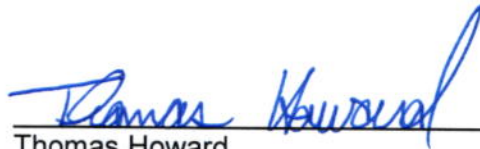
Finally, Petitioners suggest that the decision to issue a permit on their application is based on error in law. As support for this contention Petitioners contend a lack of substantial evidence supporting the Division's conclusion that the impoundment of water is subject to the State Water Board's permitting authority. This contention has been fully addressed in section 4.2, above.

ORDER

The State Water Board finds that the decision to issue Permit 21305 on Application 30860 was appropriate and proper. Accordingly, Petitioners' petition for reconsideration is denied. If Petitioners' wish to request revocation of their permits, they may do so, but they do so at their own risk. This order does not grant Petitioners' request for an order stating that their pond is not subject to the State Water Board's permitting authority.

JUL 3 2014

Dated: _____



Thomas Howard
Executive Director