

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26627)	
HENWOOD ASSOCIATES, INC.,)	ORDER: WR 88- 19
Applicant,)	SOURCE: Green Creek, a tributary
DEPARTMENT OF FISH AND GAME,)	of Walker River
Protestant.)	COUNTY: Mono

ORDER AFFIRMING DECISION 1620
AND DENYING PETITIONS FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

The Board having adopted Decision 1620 on June 16, 1988; the Board having received timely petitions for reconsideration from Henwood Associates, Inc. (Henwood) and the California Department of Fish and Game (Department): the Board having duly considered the petitions, the Board finds as follows:

2.0 APPLICABLE LAW

7.1 Section 1357 of the Water Code authorizes the Board to reconsider all or part of a decision approving an application to appropriate water, but does not provide reconsideration as a matter of right. Regulations implementing Water Code § 1357 are codified in Title 23 of the California Code of Regulations at 23 CCR 768-770.

2.2 Section 768 establishes grounds for reconsideration:

"(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the [petitioner] was prevented from having a full bearing;

"(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."

2.3 Section 770 describes the Board's options in dealing with petitions for reconsideration:

"(a) The board may:

(1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration set out in Section 768; or,

(2) After review of the records, including any hearing transcript and any material submitted in support of the petition:

(A) Deny the petition upon a finding that the decision or order was appropriate and proper; or,

(B) Set aside or modify the decision or order; or,

(C) Take other appropriate action.

"Before taking final action, the board may, in its discretion, hold a hearing for the purpose of oral argument or receipt of additional evidence or both."

3.0 BACKGROUND

- 3.1 On November 20, 1980 Henwood filed Application 26627 for appropriation of up to 20 cubic feet per second (cfs) from Green Creek at Dynamo Pond for hydroelectric power generation.
- 3.2 The Department protested Application 26627 on the grounds that diversion of the natural flows of Green Creek would have adverse effects on fish and wildlife downstream from Dynamo Pond.
- 3.3 A hearing on Application 26627 was held on February 16 and 17 and on March 17, 1988 to receive testimony regarding unresolved issues, including appropriate flows necessary for the protection of fish in the reach of Green Creek downstream of Dynamo Pond. Representatives of the Department and Henwood testified at length regarding the anticipated consequences of various diversion regimes.
- 3.4 The Board's Division of Water Rights prepared and circulated a draft Environmental Impact Report (EIR) describing anticipated environmental consequences of Henwood's proposed project, as required by the California Environmental Quality Act (Public Resources Code § 21000 et seq., "CEQA"). The Department and other interested persons submitted comments that were addressed in the final EIR. The final EIR was part of the administrative record on Application 36627.
- 3.5 Decision 1620 includes conditions necessary to mitigate adverse environmental impacts identified in the EIR. Among the conditions imposed on Henwood's project were the following, which are the subject of the petitions for reconsideration:

a. Henwood is prohibited from diverting water unless the flow in Green Creek downstream of Dynamo Pond is 9 cfs or more; and

b. Henwood is prohibited from engaging in construction activity in the Green Creek Canyon between April 15 and July 15.

3.6 The Department challenges the instream flow level, contending that the instream flow requirements in Decision 1620 are based on incorrect interpretation of habitat availability curves developed from instream flow models.

3.7 Henwood challenges the construction ban, contending that there is no substantial evidence in the record to justify a construction ban extending beyond June 15.

4.0 PETITION OF CALIFORNIA DEPARTMENT OF FISH AND GAME

4.1 The Department's petition, while unclear, appears to be based on a contention that there is no substantial evidence to support the instream flow requirements in Decision 1620, or that the Board made an error of law by establishing instream flow requirements that are different than those recommended by the Department.

4.7 Sections 5937 and 5946 of the Fish and Game Code require the Board to establish conditions for appropriations of water in substantially \$11 of Mono County that will keep fish below dams in "good condition". The Department stipulated that its analysis was based on preserving existing conditions for the Green Creek fishery.

- 4.3 Habitat availability is used as a measure of the condition of fisheries. It is assumed that the more habitat there is the better condition the fish will be in. Habitat availability is analyzed using projections made with a mathematical model that quantifies relationships between flow and habitat. An instream flow model was developed from observations made in several streams along the eastern slope of the Sierra Nevada. Models are subject to substantial manipulation by varying the initial assumptions.
- 4.4 Henwood's experts testified that fry were the most critical (limiting) life stage for trout in Green Creek. Henwood offered no substantial empirical evidence to support this assertion. Since the model assumes that fry prefer calm water, selection of fry as the critical life stage results in projections favoring relatively low flows in the Creek to optimize habitat for fry. These results were consistent with Henwood's proposal to divert all but 5 cfs from the Creek.
- 4.5 The Department's experts elected to focus on catchable adult fish. The Department, like Henwood, did not offer substantial empirical evidence to support selection of the adult life stage as critical. Since the model assumes that adult fish prefer deep water, the Department's choice results in projections requiring relatively high flows to optimize habitat for catchable adult fish. This result is consistent with the management for the benefit of the fish most desirable to anglers.

4.6 The Board considered the conflicting testimony regarding the relative importance of habitat for fry, juvenile fish, and adults in Green Creek. The Board's independent analysis gave equal weight to all life stages. This produced more balanced projections that are consistent with existing conditions in Green Creek. The projected amount of habitat that would have been available if Henwood's project had been operated with a minimum bypass of 9 cfs during the winter over the period of record for Green Creek approximates the amount of habitat calculated to be available under the fluctuating conditions that have occurred. During this period daily flows in Green Creek averaged approximately 9 cfs, with minimum monthly average flows of 3.5 cfs and maximum monthly average flows of over 20 cfs during the winter.

4.7 The Department argues that the stabilized flow regime established by Decision 1620 will deny fish in Green Creek the asserted benefits of above-average winter flows. There was testimony that fish populations have evolved with adaptations to tolerate a fluctuating environment. There was no evidence that such fluctuations are a prerequisite for maintaining fish populations in good condition.

4.8 The Department also argues that Henwood failed to prove that the Dynamo Pond project will not have significant environmental impacts on fish in Green Creek because the record contains testimony that "reduced" flows could aggravate icing conditions. The record contains substantial evidence to support a finding that icing conditions are not uncommon in Green Creek under the existing winter flow regime. Maintenance of instream flows that approximate the average winter

flows available in Green Creek cannot be characterized, in all fairness, as a "reduced" flow likely to aggravate icing conditions.

4.9 The Department's contention that the Board acted improperly in its exercise of discretion to evaluate the Department's recommendations regarding instream flows necessary to keep fish below dams in "good condition" is without merit. Neither Section 1243 of the Water Code nor Sections 5937 and 5946 of the Fish and Game Code require the State Board to be bound by the Department's recommendations in establishing instream flows for fish and wildlife. The Board will give deferential consideration to recommendations developed by the Department in its role as the state agency responsible for protection of fish and wildlife resources. However, the Board is obligated by its responsibility for allocation of the water resources of the state to balance the Department's recommendations with state policy favoring the fullest reasonable use of the waters of the state. Furthermore, as lead agency under CEQA the Board is responsible for identification, assessment and mitigation of the environmental impacts of appropriations of water. The Board is required to exercise its independent judgment in the establishment of conditions, including instream flow requirements, to mitigate potential environmental impacts of water appropriation.

5.0 PETITION OF HENWOOD ASSOCIATES, INC.

5.1 Henwood's petition is based on a contention that there is no substantial evidence to support extension of the construction ban

imposed to protect deer from two months (as proposed by Henwood) to three months (i. e., until July 15).

5.3 The Draft Environmental Impact Report for the Dynamo Pond project disclosed the possibility that the migration of deer through the project area could be disrupted by construction activities between April 3.5 and June 15. Henwood proposed suspension of construction during that period to avoid this impact.

5.3 The Department submitted comments on the draft EIR, including the following comment regarding impacts on deer:

"Deer. Most other Sierra east slope development projects have undertaken detailed studies by independent biological consultants to evaluate existing wildlife resources. This document fails to present a numerical estimate of migrating deer, their migratory routes, or a definitive use time frame. The Department has empirical knowledge that deer migration in the area lasts at least through June 15. We, therefore, oppose the construction schedule outline on page 21 of the Draft EIS [sic] since this schedule places highly disruptive construction activities within the spring migration period, the period of crucial importance to migrating pregnant does. [emphasis added]

"Riparian Habitat. The document wrongly infers that riparian habitat is of low value to deer, even fawning does. It is known that deer spend relatively little time in meadows and riparian areas since little time is required by consume (?) the abundant feed and water resources present (Ashcraft, 1976). The document relies only on the results of a cursory survey in its assessment of deer use of the project area. Therefore, if construction were permitted during the fawning period, as proposed, it is likely that the does would abandon their historical fawning grounds, attempt to fawn elsewhere in less suitable fawning habitat, and even these fawning niches could be vacated because does have been shown to be very sensitive to disturbance at fawning time (Taylor, 1987). The document fails to recognize the possibility of such an impact.

Therefore, to mitigate this impact construction should be precluded during the June 15-July 3.5 fawning period."

The Department's comment, included as evidence in the Board's administrative record on Application 26627, identifies additional concerns related to both prolonged migration (after June 15) and fawning does in riparian habitat along Green Creek. Neither Henwood nor any other interested person contradicted the Department's assertion that deer could be adversely affected by construction activities in the project area during the fawning season. The Department's comment on the draft EIR constitutes substantial evidence of a potential adverse environmental impact that the Board was required to address under the provisions of CEQA in the final EIR, and in any decision that establishes conditions to mitigate environmental impacts.

- 5.4 Henwood contends that the Department constructively withdrew its recommendation that construction be prohibited between June 1.5 and July 15 in an exchange of correspondence regarding Henwood's application for a license from the Federal Energy Regulatory Commission (FERC). That correspondence highlighted the Department's concerns about instream flows, and was essentially silent regarding other mitigation measures to be incorporated into the FERC license. The Department's correspondence regarding FERC's license proceeding does not abrogate the Department's comment on the Board's EIR for this project. The cited correspondence does not contain an unequivocal

retraction of the Department's comments regarding the impact of construction on fawning does.

ii.0 CONCLUSIONS

Based on our review of the administrative record in this matter, and on the foregoing analysis of the petitions for reconsideration filed by the Department and by Henwood we conclude as follows:

- 6.1 The record contains substantial evidence to support our independent analysis of instream flow data and habitat-availability projections based on balanced weighting of life stages.
- 6.2 The Board's exercise of its independent judgment in the allocation of water resources of the state among competing beneficial uses, including instream beneficial uses protected by the public trust, is not an error of law.
- 6.3 The Department's petition fails to raise any other substantial issues related to the causes for reconsideration in 71 CCR 768.
- 6.4 The record contains substantial uncontroverted evidence that, construction of Henwood's Dynamo Pond project, as proposed in Application 26627, could have a significant adverse impact on deer in the project area unless construction is suspended during the entire migratory and fawning period extending from April 15 to July 15.
- 6.5 Decision 1620 was appropriate and proper.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petitions for reconsideration of the Department, of Fish and Game and of Henwood Associates, Tnc. are denied; and that Decision 1620 is affirmed.

CERTIFICATION

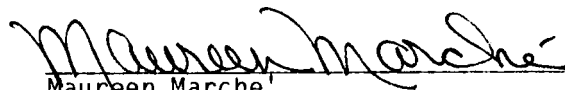
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 7, 1988.

AYE: W. Don Maughan
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: Darlene E. Ruiz
Edwin H. Finster

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board

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1. The first part of the document is a list of names and addresses of the members of the committee. The names are listed in alphabetical order and the addresses are given in full. The list is as follows:

Members of the Committee

Mr. A. B. C. 123 Main Street, New York, N. Y.
Mr. D. E. F. 456 Broadway, New York, N. Y.
Mr. G. H. I. 789 Park Avenue, New York, N. Y.
Mr. J. K. L. 1010 Fifth Avenue, New York, N. Y.
Mr. M. N. O. 1212 Madison Avenue, New York, N. Y.
Mr. P. Q. R. 1515 Lexington Avenue, New York, N. Y.
Mr. S. T. U. 1818 York Avenue, New York, N. Y.
Mr. V. W. X. 2121 East 86th Street, New York, N. Y.
Mr. Y. Z. A. 2424 East 95th Street, New York, N. Y.

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Handwritten signature
By: _____
Title: _____