

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0029-EXEC

In the Matter of Petition for Reconsideration of
GOLDEN BEAR TRUST
Regarding Order canceling Application 30578

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

By this order, the Executive Director denies Golden Bear Trust's (petitioner) petition for reconsideration of the State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division) Order Canceling Application 30578, dated May 29, 2008. Petitioner states it should be granted an additional 12 months to complete its project.

For the reasons set forth below, the Executive Director finds that the decision to cancel Application 30578 was appropriate and proper, and therefore, Golden Bear Trust's petition for reconsideration is denied.

2.0 GROUND 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.)² The legal bases for reconsideration are: (a) irregularity in the proceedings, or any

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 petitions for reconsideration of an order canceling an application falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the order.

² 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.

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.

A petition for reconsideration of a Board order must include certain information, including the name and address of the petitioner, the specific board action of which petitioner requests reconsideration, the date on which the order was adopted by the Board, the reason the action was inappropriate or improper, the specific action which petitioner requests, and a statement that copies of the petition and accompanying materials have been sent to all interested parties. (§ 769, subd. (a)(1)-(6).) Section 769, subd. (b) of the regulations provides that "if reconsideration is based in whole or in part on Section 768, the petition shall include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented." Section 769, subd. (c) of the regulations further provides that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition.

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 Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the 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 DISCUSSION

Golden Bear Trust filed a water right application with the Division on October 9, 1996, requesting the right to collect to storage 30 acre-feet per annum (afa) from November 1 of each year through June 14 of the succeeding year from Sopiago Creek tributary to Middle Fork Cosumnes River. Application 30578 was accepted by the Division on October 9, 1996, and noticed on May 30, 1997. Application 30578 sought authorization to store water at a location where two dam failures had already occurred. The Division received protests from Rancho Murieta Community Services District, Wetsel-Oviatt, Sierra Pacific Industries, and El Dorado National Forest (National Forest). The National Forest protest remains unresolved.

Due to the prior dam failures at the storage site proposed under Application 30578, the National Forest protest requested that a registered engineer familiar with dam construction design the dam. In Division letters dated April 15, 2002, August 16, 2002, and April 10, 2003, petitioner was advised, pursuant to Water Code section 1275, to submit to the Division engineering drawings for construction of the dam.

On May 29, 2003, petitioner submitted an amended application requesting to increase the diversion quantity from 30 to 90 afa and to change the diversion season from November 1 of each year through June 14 of the succeeding year to January 1 to December 31. Once an application is accepted for filing, the quantity and diversion season cannot be increased. By letter dated February 28, 2007, the Division requested pursuant to Water Code section 1275 that petitioner submit a revised project description indicating any proposed changes to the project, engineering drawings for repairs to the dam and a water availability analysis.

Petitioner's only response has been a November 14, 2008³ email requesting additional time to work on Application 30578⁴. Inasmuch as petitioner's email provides any information relevant to the legal bases for reconsideration under Section 768, it appears to rely on Section 768, subdivision (c). Section 768, subdivision (c) requires petitioner to show that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced.

It is also questionable whether petitioner's November email meets the requirements for a petition under Section 769. As discussed above, a petition for reconsideration must include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the Board and the reason it was not presented, and be accompanied by a statement of points and authorities *in support of the legal issues raised in the petition*.

³ Pursuant to Section 768, a petition for reconsideration of a Board decision or order must be received by the Board "[n]o later than thirty (30) days after adoption by the board of a decision or order...." While the original Division Order Canceling Application 30578 is dated May 29, 2008, an October 15, 2008 letter from the Division advised petitioner that, due to an address change that resulted in the Order being returned as unclaimed, the deadline for submitting a petition for reconsideration was extended to 30 days from the date of the October 15 letter.

⁴ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the Board failed to complete its review of the petition on time. (See California Correctional Peace Officers Ass'n v. State Personnel Bd. (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

Application 30578 was cancelled by the Division for failure to submit information requested pursuant to Water Code section 1275. The Division repeatedly requested from petitioner the engineering drawings for construction of the dam requested as a term of dismissal of the National Forest's protest. Petitioner was repeatedly advised that the Division would initiate cancellation of Application 30578 if petitioner did not timely submit the engineering drawings. Petitioner's repeated failure to submit the requested information is not commensurate with a claim that such evidence could not have been produced by the exercise of reasonable diligence, as required by Section 768, subdivision (c).

Petitioner also does not claim and has not presented any facts that would show (a) irregularity in proceedings, or abuse of discretion, by which petitioner was prevented from having a fair hearing; (b) that the decision is not supported by substantial evidence; or (c) error in law. Accordingly, petitioner has not provided information to support any of the legal bases for reconsideration.

4.0 CONCLUSION

For the reasons discussed above, the Executive Director finds that the decision to cancel Application 30578 was appropriate and proper. To the extent that this order does not address all of the issues in the petition for reconsideration, the Executive Director finds that either these issues are insubstantial or that petitioner has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. Accordingly, the petition for reconsideration is denied.

ORDER

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

Dated: **APR 28 2009**


Dorothy Rice
Executive Director