

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2001 - 02**

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In the Matter of a Petition for Reconsideration of an Order, Dated October 30, 2000, Approving a  
Petition for Extension of Time and Amending Water Right Permit 20563,  
Navarro Watershed Protection Association,  
Petitioner

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SOURCES: The Navarro River and an Unnamed Stream Tributary to the Navarro River

COUNTY: Mendocino

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**ORDER GRANTING IN PART AND DENYING IN PART THE PETITION FOR  
RECONSIDERATION**

BY THE BOARD:

**1.0 INTRODUCTION**

By this Order, the State Water Resources Control Board (SWRCB) grants in part and denies in part the Navarro Watershed Protection Association's (NWPA) petition for reconsideration of an order, dated October 30, 2000, approving a petition for extension of time and amending Water Right Permit 20563. The SWRCB sets aside the October 30, 2000 order and directs the Division of Water Rights (Division) to conduct further proceedings regarding the petition for extension of time.

**2.0 BACKGROUND**

The SWRCB issued Permit 20563 to Betty E. Ingram and Barbara M. McGuinness on October 26, 1989. Dr. Larry Londer acquired Permit 20563 some time in the year 2000. Permit 20563 authorizes the diversion of 71 acre-feet per annum (afa) from the mainstem of the Navarro River in Mendocino County, and from an unnamed stream tributary to the Navarro River. The water is to be diverted to storage in a reservoir located on the unnamed stream. The application for the permit specified that the capacity of the reservoir would be

38 acre-feet, and the permit therefore authorizes diversion to storage of 38 acre-feet, to be replenished by 33 acre-feet. The authorized diversion season is from November 1 of each year to March 31 of the succeeding year, and the purposes of use are fish and wildlife protection and enhancement; recreation; frost protection; heat control; and irrigation. The place of use is a net of 30 acres within a gross of 34 acres.

Term 8 of Permit 20563 required the permittee to complete construction work by December 31, 1994. Term 9 required complete application of water to beneficial use by December 31, 1995. According to a 1993 progress report, permittee completed construction work in 1993. Upon conducting a compliance inspection in 1997, however, the Division found that only the reservoir had been completed. The Division found that the diversion works needed to divert water from the mainstem to the storage reservoir had not been constructed. The Division's inspection also indicated that the reservoir had been filled by flow from the unnamed stream, but that the diversion works needed to deliver the stored water to the place of use had not been constructed, and that the most of the place of use was not under cultivation. During the inspection, the permittee, then Ms. McGuinness, informed Division staff that she had been diverting water directly from the mainstem in order to irrigate crops under claimed riparian rights. The Division concluded that water had been used under Permit 20563 only for the purposes of recreation and fish and wildlife protection and enhancement at the reservoir.

On November 1, 1999, Ms. McGuinness filed a petition for extension of time to complete construction and application of water to beneficial use. The petition stated that development of the property had taken longer than anticipated and additional time was needed to complete diversion works. The petition also stated that no water had been used under Permit 20563, but that approximately 8 acres had been irrigated under claimed riparian rights.

The NWPA and the Mendocino/Lake Group of the Sierra Club filed protests against the petition for extension of time. The NWPA's protest was based, among other things, on the fact that the Division had not considered the cumulative impacts of the "application" for extension of time on coho salmon and steelhead trout. The Division did not accept either protest on the basis that the

protestants failed to supply information specific to the petition for extension of time, as opposed to the underlying water right as a whole.

On October 30, 2000, the Division Chief issued an order approving the time extension at issue, here and amending Term 9 of Permit 20563 to require complete application of water to beneficial use by December 31, 2010.<sup>1</sup> The Division Chief found that the permittee had proceeded with diligence and good cause had been shown for granting the extension of time. The NWPA filed a petition for reconsideration of the October 30, 2000 order.

### 3.0 GROUNDS FOR RECONSIDERATION

Any interested person may file a petition for reconsideration of an order or decision under authority delegated to an officer or employee of the SWRCB pursuant to Water Code section 1122 and California Code of Regulations, title 23, sections 768-770. Section 768 of the SWRCB's regulations 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.

Petitions for reconsideration must 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.

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<sup>1</sup> The SWRCB has delegated to the Chief of the Division the authority to approve permit extensions for up to a total of ten years where applicable statutory and regulatory requirements are met, there are no competing projects that would be adversely affected, and there are no outstanding protests. (SWRCB Resolution No. 99-031.)

- (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.

(Cal. Code Regs., tit. 23, § 769, subd. (a).) Section 769, subdivision (c) of the regulations provides further 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.

On reconsideration, the SWRCB may:

- (1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration; or
- (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.

(Cal. Code Regs., tit. 23, § 770.)

#### **4.0 NAVARRO WATERSHED PROTECTION ASSOCIATION'S PETITION**

In its petition for reconsideration, the NWPA alleges that the Division failed to consider the cumulative impacts of the time extension, and the NWPA questions whether water is available for appropriation. The NWPA also alleges that the permittee failed to exercise due diligence in completing construction work and application of water to beneficial use as required under the Water Code. Finally, the NWPA states that the amount of water that may be appropriated under the permit, 71 afa, is more than is necessary to irrigate 30 acres.

A petition for extension of time will be granted "only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted." (Cal. Code Regs., tit. 23, § 844.)

As a whole, the NWPA's petition for reconsideration is inartfully worded and conclusory. The NWPA appears to be alleging error in law, but it is difficult to ascertain on what grounds the NWPA petitions for reconsideration. In addition, it is questionable whether the petition, which is one and a half pages long, provides an adequate statement of points and authorities in support of

the legal issues raised.<sup>2</sup> Nonetheless, having reviewed the record, we find that it would be appropriate to vacate the October 30, 2000 order granting the petition for extension of time and remand the matter to the Division for further evaluation consistent with this order.

Judging from the NWPA's protest and petition for reconsideration, the gravamen of the NWPA's objection to the petition for extension of time is NWPA's allegation that approval of the time extension could adversely impact fishery resources, particularly coho salmon and steelhead trout. Since the SWRCB issued Permit 20563 in 1989, there have been a number of significant developments in the Navarro River watershed. Effective December 2, 1996, the National Marine Fisheries Service (NMFS) listed Central California Coast Coho Salmon as threatened under the Endangered Species Act (ESA). Effective August 7, 2000, NMFS listed Northern California steelhead trout as threatened under the ESA as well. (61 Fed.Reg. 56138; 65 Fed.Reg. 36074; 50 C.F.R. § 223.102, subds. (a)(3), (22).) In light of these and other developments, in recent decisions on water right applications in the Navarro River watershed, the Division has placed special emphasis on the flows needed to protect coho and steelhead. (See, e.g., Division Decision 2000-01.)

In this case, the Division granted the time extension without any conditions. It is unclear from the record whether the Division evaluated the petition for extension of time taking into consideration the fact that a major component of this project has not been completed, and any pertinent new information concerning the flows necessary to protect fishery resources. Accordingly, we conclude that reconsideration should be granted for the limited purpose of reevaluating whether it would be in the public interest to approve the petition for extension of time, or to condition approval of the petition, in light of potential impacts to fishery resources, that may result from implementation of the undeveloped component of the project.

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<sup>2</sup> We also note that the NWPA did not send a copy of its petition to other interested parties, including the permittee, or include a statement in the petition that copies had been sent to all interested parties, as required by section 769, subdivision (a)(6) of the SWRCB's regulations. The SWRCB sent a copy of the petition by facsimile to the permittee's attorney, Lisa L. Hillegas, on December 21, 2000, and sent copies to all interested persons by regular mail on December 22, 2000. Although the SWRCB has not had a practice of denying petitions for reconsideration solely for failure to comply with subdivision (a)(6) of the regulations, we are concerned by the NWPA's failure to comply with this requirement. We advise the NWPA that, in the future, the SWRCB could in its discretion deny a petition for reconsideration for failure to meet this requirement.

The NWPA's petition for reconsideration should be denied with respect to the other issues raised in the petition. In its petition, the NWPA provided little or no support for its allegations that the permittee failed to exercise due diligence in completing construction work and application of water to beneficial use, and that the amount of water authorized to be appropriated, 71 afa, is excessive. In addition, the NWPA did not raise the issue of due diligence in its protest. The NWPA raises this issues for the first time in its petition for reconsideration. The NWPA offers no justification for its failure to raise this issue before the Division. Moreover, the Division's determinations on both of these issues are supported by the evidence in the record.<sup>3</sup>

It bears emphasis that by granting reconsideration we do not authorize reevaluation of the permittee's project as a whole. The Division was correct that a petition for extension of time does not necessarily entail reevaluation of the underlying water right. Rather, in reviewing a petition for extension of time, only those changes that will take place if the petition is granted should be considered. In this case, however, no water has been used under Permit 20563 for purposes other than recreation and fish and wildlife protection and enhancement. Granting the time extension would allow the permittee to complete its project and appropriate for irrigation purposes up to 71 afa from the unnamed stream and the mainstem of the Navarro River. The potential impacts of those changes should be evaluated and considered in determining whether and under what conditions it would be in the public interest to grant the time extension.

**IT IS HEREBY ORDERED:**

1. NWPA petition for reconsideration is granted for the limited purpose of reevaluating whether it would be in the public interest to approve the petition for extension of time, or to condition approval of the petition, in light of the potential impacts to fishery resources that may result if the petition is approved.

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<sup>3</sup> With regard to the issue whether 71 afa is excessive, it merits note that the SWRCB has ongoing authority to prevent waste or unreasonable use of water. (Wat. Code, §§ 100, 275.) If in the future the SWRCB determines that the permittee's use of water is wasteful or unreasonable, the SWRCB can take steps to rectify the situation.

2. The October 30, 2000 order approving the petition for extension of time and amending Water Right Permit 20563 is set aside.
3. The Division is directed to consider whether and under what circumstances it would be in the public interest to approve the petition for extension of time in light of the potential impacts to fishery resources that may result if the petition is approved. The Chief of the Division is delegated the authority to act on the petition, consistent with applicable statutory and regulatory requirements for consideration of petitions for extensions of time, unless a hearing is required pursuant to California Code of Regulations, title 23, section 844.
4. Except as otherwise provided in ordering paragraph one, above, NWPA's petition for reconsideration is denied.

### CERTIFICATION

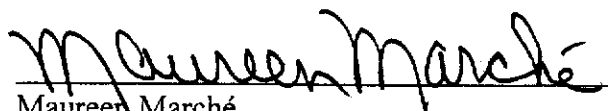
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 25, 2000.

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