STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001- 07

In the Matter of Application 30532
MONTEREY COUNTY WATER RESOURCES AGENCY,
Applicant

SALINAS VALLEY PROTESTANTS,
Protestant

Tanimura & Antle,
Clark Colony Water Company,
Rosenberg Family Ranch,
East Side Water Alliance,
Salinas Valley Water Coalition,
Interested Parties.

SOURCE: Nacimiento River
COUNTY: San Luis Obispo

ORDER DENYING PETITION FOR RECONSIDERATION OF DECISION 1642

BY THE BOARD:

1.0 BACKGROUND

On February 15, 2001, the State Water Resources Control Board (SWRCB) adopted Decision 1642 (D-1642) which approved Application 30532 of the Monterey County Water Resources Agency (MCWRA). In D-1642, the SWRCB concluded that the 27,900 acre-foot (af) increment of water sought to be appropriated pursuant to Application 30532 is available for appropriation, and the diversion to storage of the 27,900 af increment does not injure senior water rights or harm public trust resources. The SWRCB also concluded that approval of Application 30532 is

statutorily exempt as an ongoing project and categorically exempt as an existing facility from the California Environmental Quality Act (CEQA).

On March 5, 2001, the Salinas Valley Protestants (SVP) filed a petition for reconsideration of D-1642. The petition was filed on time. In their petition, the SVP contend that D-1642 contains errors in law. The SVP contend that : (1) the SWRCB used the wrong baseline in determining that approval of Application 30532 is categorically exempt from CEQA, (2) the SWRCB failed to analyze the SVP's water rights, and (3) the Hearing Officer's Order Quashing Subpoena of Clients of Mr. Maloney was improper.

2.0 THE LAW GOVERNING RECONSIDERATION

Water Code section 1122 provides for reconsideration of decisions upon the SWRCB's own motion or upon petition filed within 30 days of adoption of the decision. Title 23, California Code of Regulations, section 768 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."

Requirements for petitions for reconsideration are set forth in California Code of Regulations, title 23, section 769. Subdivision (c) of section 769 provides that petitions for reconsideration shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.

Actions that the SWRCB may take on reconsideration are set forth in California Code of Regulations, title 23, section 770. The SWRCB may refuse to reconsider the decision, deny the petition, set aside or modify the decision, or take other appropriate action.

3.0 CEQA BASELINE

The SVP contend that the SWRCB should reconsider D-1642 to take into account a case decided the same day as D-1642, *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99 [104 Cal.Rptr.2d 326] (hereafter *September Ranch*). The SVP contend the case indicates that the SWRCB used the wrong baseline for its CEQA analysis. (Petition for Reconsideration, pp. 3-6.) The SVP are incorrect. If anything, *September Ranch* lends additional support to the SWRCB's approach to evaluating the impacts of projects that have already been constructed at the time of SWRCB approval. In any event, it would make no difference whether the SWRCB applies the test followed in D-1642 or the test the SVP contend should apply – the conditions used as the CEQA baseline would be the same. The baseline refers to the point of reference, also referred to as existing physical conditions or the existing environment, against which changes are measured to determine if a project may have a significant adverse effect.

September Ranch deals extensively with the baseline used in an Environmental Impact Report (EIR) for evaluating the water supply impacts of a project involving development for residential purposes of property that had historically been used as a ranch. The lead agency used as its baseline an average of water pumped over a three-year period after the application was filed and

immediately before project approval, even though this average exceeded estimates of the amount historically used for irrigation and included anomalously high pumping in one year when water was pumped for aquifer testing. The court concluded that there was no justification for using these inflated figures as the baseline. (*Id.* at ___ [104 Cal.Rptr.2d at 343-344].) The court concluded that that baseline should have been based on conditions as they existed at the beginning of the environmental review process, not the end. (*Id.* at ____ [104 Cal.Rptr.2d at 345].)

September Ranch did not adopt an inflexible standard that invariably applies in determining the CEQA baseline:

> "[T]he date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods. In some cases, conditions closer to the date the project is approved are more relevant to a determination whether the project's impacts will be significant."

(*Id.* at ____ [104 Cal.Rptr.2d at 345].) Also, *September Ranch* is distinguished from D-1642 because *September Ranch* addressed the baseline for use in an EIR and D-1642 involved the baseline for applying the categorical exemption for existing facilities. The court distinguished other cases involving the baseline for applying the categorical exemption for existing facilities on the grounds that those cases involved categorical exemptions, not an EIR. (See *id.* at ____ [104 Cal.Rptr.2d at 346-347] [distinguishing *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428 [91 Cal.Rptr.2d 322] and *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307 [31 Cal.Rptr.2d 914].) Even so, *September Ranch* supports the conclusion that there may be

circumstances where the conditions existing at the time of approval may not be the appropriate baseline in applying the categorical exemption for existing facilities.[1]

In fact, the SWRCB has not used conditions as they exist at the time of approval as the CEQA baseline when considering issuance of a permit for pre-existing but unauthorized diversions. Ordinarily, the baseline for applying the existing facilities exemption is the time the SWRCB determines CEQA applicability, not the effective date of CEQA. (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1314 [31 Cal.Rptr. 914, 918].) As the SWRCB recognized in Decision 1639 (In the matter of Application 29664 of Garrapata Water Company), however, this approach would not be appropriate in cases involving after the fact permitting. "Applying the existing facilities exemption to existing, unauthorized diversions would encourage applicants to initiate diversions without first obtaining water right permits, undermining the policies of both CEQA and the Water Code." (SWRCB Decision 1639 at 31.) The *September Ranch* court expressed similar concerns about setting the CEQA baseline based on water use rates that occur after a project is proposed, but before it is approved, because "[i]t was in [the applicant's] interests to elevate water production figures in order to establish as high a baseline as possible." (*September Ranch, supra,* 87 Cal.App.4th at ___ [104 Cal.Rptr.2d at 346].)

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[1] Categorical exemptions are based on a determination that the exempted activities will not have a significant effect on the environment. (Pub. Resources Code, § 21084, subd. (a); Cal. Code Regs., tit. 14, § 15300. See also Cal. Code Regs., tit. 14, § 15300.2, subd. (c).) Hence, determination of the appropriate baseline may affect the determination whether a categorical exemption applies. Statutory exemptions, on the other hand, are not based on a determination that there will be no significant effect. (See *Surfrider Foundation v. California Coastal Commission* (1994) 26 Cal.App.4th 151, 155 [31 Cal.Rptr.2d 374, 375] [The exception to categorical exemptions, which applies CEQA to activities that would otherwise be categorically exempt if due to unusual circumstances they may have a significant effect on the environment, does not apply to statutory exemptions]. See generally *Napa Valley Wine Train, Inc. v. Public Utilities Commission* (1990) 50 Cal.3d 370 [267 Cal.Rptr. 569, 787 P.2d 976].) Even assuming that SVP's arguments concerning the CEQA baseline supported the conclusion that the categorical exemption for existing facilities was inapplicable, Application 30532 would still be exempt from CEQA under the statutory exemption for ongoing projects.

As the SWRCB also recognized in Decision 1639, it may not be necessary to go all the way back to pre-project conditions to set an appropriate baseline consistent with the policies of CEQA and the Water Code. The SWRCB determined that the existing facilities exemption could still be applied if construction was completed before CEQA, the applicant did not know at the time that a permit was required, and there has been no expansion in place of use or purpose of use since CEQA was enacted. (SWRCB Decision 1639 at 31.) In practical effect, Decision 1639 sets the CEQA baseline for permitting of diversions initiated without necessary permits as pre-project or pre-CEQA conditions, whichever occurred later. (See also *id.* at 30 [existing facilities exemption cannot be used for a permit that would authorize an increase in the amount of water diverted].) In D-1642, the SWRCB applied the test set forth in Decision 1639 to determine whether the categorical exemption for existing facilities applies. (SWRCB Decision 1642 at 19, n. 11.)

In their petition for reconsideration, the SVP contend that the SWRCB used conditions existing at the time of approval as the CEQA baseline, and argues that, based on *September Ranch*, the CEQA baseline should instead be based on the date the environmental review process is initiated. In fact, the SWRCB applied what would normally be a more stringent test than the SVP are requesting. By requiring that the project meet the test set forth in Decision 1639 for the existing facilities exemption to apply, the SWRCB effectively set the baseline based on the amount of water diverted before CEQA was enacted in 1970. Setting the baseline based on when the environmental review process was initiated, as the SVP request, would set the baseline based on the amount of water diverted at a much later time, sometime between 1996, when MCRWA filed its application, and 2001, when the SWRCB determined that the categorical exemption applies.

On the facts of this particular case, it makes no difference which test is used for setting the CEQA baseline. MCRWA completed Nacimiento Reservoir and used it to capacity before CEQA was enacted, and has continued to use the reservoir to capacity when enough water was available for appropriation. So long as one takes into account variation in hydrologic conditions from year to year, it does not matter whether the baseline is established based on conditions existing in 1970, 1996 or 2001. The CEQA baseline is the same.

Although we conclude that the SVP's arguments are without merit, the discussion of the CEQA baseline in D-1642 may be confusing. Accordingly, the decision should be revised. The last sentence in the last full paragraph on page 18 and the citation that follows it should be deleted and replaced with the following:

> "Even if one looks back to the conditions existing on the 1970 effective date of CEQA, as opposed to the conditions existing on the date when the SWRCB determines the applicability of CEQA, approval of Application 30532 does not involve an expansion beyond existing use. (See generally SWRCB Decision 1639 at 31 [discussing the use of the existing facilities exemption when a permit is issued for a pre-existing unauthorized diversion].)"

In addition, the third and fourth sentences in the last paragraph on page 19 should be deleted, and replaced with the following:

> "Here, there is no evidence in the record that approval of the additional increment of storage requested in Application 30532 will result in any change in reservoir operations that could adversely affect the environment. This conclusion applies whether one looks to reservoir operations as they existed on the effective date of CEQA or on the date the SWRCB determines the applicability of CEQA as the baseline for determining whether issuance of a permit would result in a change in reservoir operations."

4.0 ANALYSIS OF WATER RIGHTS

The SVP contend that *September Ranch* "mandates that all claims of water rights be analyzed when any such water right is asserted as a legal basis for the approval or disapproval of a project." (Petition for Reconsideration, p. 6.) The SVP's reliance on *September Ranch* is misplaced. The case addresses the water supply impacts of approving a land use project, and does not directly address the issues that must be reviewed by the SWRCB in issuing a water right permit. Moreover, the court did not require an analysis of the individual water rights of third party water rights holders whose rights might be adversely affected by the project. (See *September Ranch, supra,* 87 Cal.App.4th at ___ [104 Cal.Rptr.2d at 340] [discussing overall water supply and demand, without breaking it down into individual claims or requiring that the water rights of individual claimants be identified].) Rather, the court called for an analysis of the water rights relied on by the applicant. The EIR was inadequate because it did not contain an adequate analysis of the applicant's claim to a riparian right that could be used as a source of water for the project. (*Id.* at ___ [104 Cal.Rptr.2d at 350-352].) The SVP also contend that the SWRCB refused to consider the needs of other water right holders unless those rights have been adjudicated. (Petition for Reconsideration, p. 6.) There is no basis for these contentions.

In D-1642, MCWRA filed an application to appropriate unappropriated water in accordance with Water Code section 1200, et. seq. In determining whether there was unappropriated water available to supply the project described in Application 30532, MCWRA's analysis considered all of the water uses in the Salinas Valley groundwater basin regardless of right. In D-1642, the SWRCB also concluded that surface water users downstream of Nacimiento Reservoir would not be injured. None of these other water uses has been adjudicated, yet all were considered. In

D-1642, the SWRCB found that MCWRA's analysis was sufficient to make the finding of water availability and was appropriate for the facts and circumstances of this case.

The SVP assert the SWRCB cannot analyze the availability of unappropriated water without separately analyzing the rights of each of the protestants. In some cases an analysis of the rights of individual claimants with competing demands may be necessary. (Cf. SWRCB Order WR 99-001 [reviewing the rights of parties claiming to be prior right holders in determining whether a permittee had violated its permit by depriving prior right holders of water].) But a specific inquiry into the individual rights of protestants who claim rights senior to a water right applicant is not necessarily required, and is not necessary in this case. If groundwater recharge will not be adversely affected, as the SWRCB determined in D-1642, there is no need to inquire into the validity or extent of any individual claimant's right to the groundwater it diverts for use. Similarly, because the SWRCB concluded that the relatively few surface water diverters downstream of Nacimiento Reservoir will not be injured, it is unnecessary to inquire into whether any individual downstream surface water diverter has a valid right to the water it is diverting. In spite of the SVP's desire to adjudicate all rights to the use of water in the Salinas Valley, or, in the alternative, to adjudicate their own rights, it was neither necessary nor appropriate to do so in the context of a hearing on Application 30532. Accordingly, there is no basis for the SWRCB to reconsider D-1642.

5.0 ORDER QUASHING SUBPOENA

The SVP issued a subpoena duces tecum (subpoena) to MCWRA prior to the hearing on Application 30532. Two items that the SVP requested that MCWRA produce pursuant to the subpoena were “all water extraction reports” and “all water conservation reports.”

MCWRA filed a Motion to Quash the Subpoena of Clients of Mr. Maloney (Motion) as to these two items. MCWRA provided documents responsive to the other requests contained in the subpoena and they were not at issue in the Motion.

A hearing was held on June 28, 2000, to provide an opportunity for the parties to present oral argument in accordance with Code of Civil Procedure section 1987.1. The Hearing Officer was required to resolve the matter in accordance with Government Code section 11450.30, subdivision (b).

On June 6, 2000, the Hearing Officer issued an Order Quashing Subpoena of Clients of Mr. Maloney (Order). In the Order, the Hearing Officer found that the information requested in the subpoena was not relevant to the issues noticed for the hearing on Application 30532, that the information requested in the subpoena is confidential pursuant to MCWRA ordinance 3717 and should not be disclosed to the SVP, and that the subpoena was not valid for failure to serve the affidavit required by Code of Civil Procedure section 1985, subdivision (b). Accordingly, the Motion was granted and the subpoena was quashed.

The SVP contend that MCWRA's "water and land use data must be disclosed so that a *September Ranch* level of analysis of the water rights can be made as a part of the Agency's burden of proof." (Petition for Reconsideration, p. 8.) The SVP's contention is not correct and is inappropriate. As discussed above, *September Ranch* does not apply to the facts of the case before us in D-1642 and does not mandate the level of analysis of the water rights claimed by the SVP. Nor does *September Ranch* address the disclosure of confidential information that might be subpoened based on a claim that it is relevant to the analysis, or provide any excuse for failing to serve the affidavit required by the Code of Civil Procedure. Accordingly, the petition does not provide any basis for the SWRCB to reconsider D-1642.

6.0 CONCLUSION

The SWRCB concludes that the SVP have provided no basis to reconsider D-1642. The SWRCB further concludes that the *September Ranch* case does not apply to the facts of the case before us in D-1642. The proper baseline was used to determine that the project is categorically exempt from CEQA. A specific analysis of individual water rights in the Salinas Valley groundwater basin or the water rights of the SVP is not necessary to determine water availability for the project described in Application 30532. The analysis in D-1642 is appropriate for the facts and circumstances of this case. Even if *September Ranch* applied to this case, it would not require the level of analysis claimed by the SVP. The SWRCB also concludes that the Hearing Officer's Order is proper and correct. Therefore, the SVP's Petition for Reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration of D-1642 filed by the SVP is denied, and that SWRCB Decision 1642 is amended as follows:

1. The last sentence in the last full paragraph on page 18 and the citation that follows it are deleted and replaced with the following:

> "Even if one looks back to the conditions existing on the 1970 effective date of CEQA, as opposed to the conditions existing on the date when the SWRCB determines the applicability of CEQA, approval of Application 30532 does not involve an expansion beyond existing use. (See generally SWRCB Decision 1639 at 31 [discussing the use of the existing facilities exemption when a permit is issued for a pre-existing unauthorized diversion].)"

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2. The third and fourth sentences in the last paragraph on page 19 are deleted, and replaced with the following:

> "Here, there is no evidence in the record that approval of the additional increment of storage requested in Application 30532 will result in any change in reservoir operations that could adversely affect the environment. This conclusion applies whether one looks to reservoir operations as they existed on the effective date of CEQA or on the date the SWRCB determines the applicability of CEQA as the baseline for determining whether issuance of a permit would result in a change in reservoir operations."

CERTIFICATION

The undersigned, Clerk 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 May 2, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSTAIN: None

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Maureen Marché
Clerk to the Board