

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of)
)
FISHERY PROTECTION AND WATER)
RIGHT ISSUES OF LAGUNITAS CREEK) ORDER: WR 96-1
)
Involving Water Right Permits 5633,) SOURCE: Lagunitas
9390, 12800 and 18546 of Marin) Creek
Municipal Water District)
(Applications 9892, 14278, 17317,) COUNTY: Marin
and 26242),)
)
Water Right Permits 19724 and 19725)
(Applications 25062 and 35079) and)
Diversion of Water Under Claim of)
Pre-1914 Appropriative Water Rights)
by North Marin Water District, and)
)
Water Right License 4324)
(Application 13965) and Diversion)
of Water Under Claim of Riparian)
Right by Waldo Giacomini.)
)

**ORDER DENYING PETITIONS FOR RECONSIDERATION
OF ORDER WR 95-17**

The State Water Resources Control Board (SWRCB) having adopted Order WR 95-17 on October 26, 1995; petitions for reconsideration of that order having been filed by the Marin Municipal Water District (District), the Sierra Club Marin Group, the Tomales Bay Association, and Mr. Willis Evans; and the petitions having been duly considered; the State Water Resources Control Board (SWRCB) finds as follows:

1.0 BACKGROUND

Order WR 95-17 amends the terms and conditions of water rights held by Marin Municipal Water District, North Marin Water District and Mr. Waldo Giacomini. The purpose of the amendments is to protect fishery resources in the Lagunitas Creek watershed and to prevent the unauthorized diversion and use of water. The petitions for reconsideration addressed in this order involve

only amendments to Water Right Permits 5633, 9390, 12800, and 18546 held by Marin Municipal Water District. The petitions do not involve water rights held by North Marin Water District and Giacomini.

The background of water development in the Lagunitas Creek watershed and related information is discussed at length in Order WR 95-17. Order WR 95-17 amended Permits 5633, 9390, and 18546 to require minimum instream flows measured in cubic feet per second (cfs); maximum water temperature requirements; development of a sediment management plan, riparian management plan, and fishery monitoring plan; maintenance of specified flow and temperature records; and annual reporting to the Division of Water Rights regarding compliance with permit conditions. The order also amended Permit 12800 to prohibit the pumping and release of water from Nicasio Reservoir on Nicasio Creek for the purpose of meeting instream flow requirements in Lagunitas Creek above the confluence of Nicasio Creek and Lagunitas Creek. Finally, the order amended the District's permits to delete previously specified terms and conditions which were superseded by the requirements established in Order WR 95-17. Included among the deleted conditions was the requirement that the District make available up to 4,000 acre-feet per annum (AFA) of water from Nicasio Reservoir for fish and wildlife in Nicasio Creek at the request of the Department of Fish and Game.¹

¹ *The problems encountered with regard to releasing water from Nicasio Reservoir for use by coho salmon and steelhead in Nicasio Creek are discussed on pages 81 through 84 of Order WR 95-17. • At the 1992 water right hearing 'preceding adoption of Order WR 95-17, neither DFG nor any other party recommended establishing a specific instream flow requirement for Nicasio Creek. At that time, DFG recommended that the 4,000 AF of water previously earmarked for instream flow use in Nicasio Creek should be made available for meeting instream needs 'in Lagunitas Creek. In a letter dated September 19, 1995 following release of the SWRCB's proposed order, however, DFG expressed support for prohibiting the pumping and release of water from Nicasio Reservoir for meeting the instream flow requirements on Lagunitas Creek. Order WR 95-17 prohibits release of water from Nicasio Reservoir directly into Lagunitas Creek below Peters Dam. In addition, the order also deletes the previously established permit term which required release of water from Nicasio Reservoir for protection of fish and wildlife in Nicasio Creek.*

The procedural context leading up to adoption of Order WR 95-17 is reviewed at length in the order. For purposes of the present order, the SWRCB simply notes that the subject of fishery flows in Lagunitas Creek has been under review, study, or litigation since several years prior to adoption of Water Right Decision 1582 in 1982. The interim flow requirements which have governed District operations between 1983 and adoption of Order WR 95-17 were established by stipulated judgments entered by the Superior Court for Marin County in 1983 and 1985. The flow requirements established in Order WR 95-17 replace the interim standards specified in the 1985 stipulated judgment.

2.0 REGULATIONS GOVERNING RECONSIDERATION

Water Code Section 1357 provides for reconsideration of SWRCB decisions or orders upon the SWRCB's own motion or upon petition filed within 30 days by any person interested in or affected by an application, permit, or license. Section 768 of Title 23 of the California Code of Regulations provides that a party 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; and
- (d) Error in law.

Section 769 of Title 23 specifies the requirements for a petition for reconsideration, among which is a statement that the petition and accompanying materials have been sent to all interested

parties. Where reconsideration is based on the availability of relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing, the petition must include a declaration stating that additional evidence is available that was not previously presented and stating the reason it was not presented. A general statement of the nature of the evidence and the facts to be proved is also required. 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.

3.0 SUMMARY OF PETITIONS

Four parties filed timely petitions for reconsideration of Order WR 95-17. Sections 3.1 through 3.4 below provide a summary of each petition.

3.1 Petition Filed by Marin Municipal Water District

The petition for reconsideration filed by the District requests reconsideration on the grounds that: (1) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced prior to the close of the hearing record; (2) Order WR 95-17 "contains irregularities and ambiguities which prevent PETITIONER from having a fair hearing"; and (3) Order WR 95-17 is not supported by substantial evidence. The petition requests that the SWRCB reconsider Order WR 95-17 and make the following changes:

"(1) Modify the artificial passage flow [upstream migration flow]² requirement such that at most two

² Order WR 95-17 uses the term "upstream migration flows" for each of the four 3-day long flows of 35 cfs or more which occur within the prescribed period as a result of precipitation release of water from District reservoirs, or a combination of both. The District's petition for reconsideration uses the term "artificial passage flow." The SWRCB recognizes that the presence of District reservoirs "artificially" influences most flows in Lagunitas Creek. The upstream migration flows required under Order

(continued...)

artificial passage flows would be required in any year; if no storm produces a trigger flow of 25 cfs as measured at the State Park Gage before December 15, PETITIONER shall be required to release sufficient water from Kent Lake to provide an upstream passage flow of 35 cfs for three consecutive days prior to January 1; and if no storm produces a trigger flow of 25 cfs as measured at the State Park Gage of 25 cfs in February, PETITIONER shall be required to release sufficient water from Kent Lake to provide an upstream passage flow of 35 cfs for three consecutive days beginning on March 1;

"(2) Provide that Petitioner will have met the instream flow requirements if, in Lagunitas Creek above Shafter Bridge, it provides at least 75% of the flows required at the State Park Gage in winter and at least 90% of the flows required at the State Park Gage in summer;

"(3) Add a critical year instream flow schedule with flow requirements of 75% of the dry year schedule; and

"(4) Modify the total ban on the use of Nicasio Reservoir water to meet instream flow requirements in Lagunitas Creek to provide for a five-year study period to determine whether such use has any negative impacts on aquatic resources."

²(...continued)

WR 95-17 can be met in a variety of ways including uncontrolled run-off, natural flow that is not diverted to storage in District reservoirs, and release of stored water. Hence, this order continues to use the term "upstream migration flow" to refer to each of the four 3-day long pulse flows intended for the benefit of upstream migration of salmon and steelhead.

The District's grounds for requesting reconsideration and the District's, requested modifications to Order WR 95-17 are addressed in Sections 4.0 through 4.2 below.

3.2 Petition Filed by the Sierra Club Marin Group

The Sierra Club Marin Group (Sierra Club) asks for reconsideration of Order WR 95-17 on the grounds that it does not require sufficient water during the summer season of June 15 to November 1 (or November 15, depending upon the year) "to provide adequately for the health of the coho salmon and the steelhead and that expert testimony calling for such flows was ignored." The Sierra Club argues that a flow of 10 cfs is required to provide good nursery flows for coho salmon and steelhead and to maintain populations of Neomysid shrimp. The Sierra Club also states that the group opposes the District's request to be allowed to use water from Nicasio Reservoir to meet flow requirements in Lagunitas Creek.

3.3 Petition Filed by the Tomales Bay Association

The Tomales Bay Association petition for reconsideration argues that Order WR 95-17 should have required at least 2 cfs higher flows during the period from May 1 to November 15. The Tomales Bay Association argues that the best balance between the flow needs of freshwater shrimp and salmonids in Lagunitas Creek would result in flows of 10 to 15 cfs during that period. The Tomales Bay Association also argues that higher flows would increase freshwater inflow to the Lagunitas Creek estuary to the benefit of several estuarine species.

3.4 Petition Filed by Willis Evans

Willis Evans requests reconsideration based on his opinion that Order WR 95-17 does not meet legal requirements to sustain public trust fish resources of Lagunitas Creek. His petition argues that maintaining the coho salmon and steelhead in good condition will require: (1) providing attraction flows to stimulate

returning adult salmonids to begin their upstream migration; and (2) providing higher nursery or rearing flows during the summer and fall periods. Mr. Evans also requests that the required instream flows in Lagunitas Creek be measured at the USGS gage near Point Reyes as well as at the State Park gage as presently required under Order WR 95-17. Finally, Mr. Evans requests that the District be required to continue to provide water from Nicasio Creek to be released for meeting instream flow needs in Lagunitas Creek at the discretion of the Department of Fish and Game (DFG).³

4.0 ISSUES RAISED IN MARIN MUNICIPAL WATER DISTRICT PETITION

The legal grounds for requesting reconsideration cited in the District's petition are addressed in Section 4.1 below. The specific changes to Order WR 95-17 requested by the District are addressed in Section 4.2.

4.1 Legal Grounds for Requesting Reconsideration

Availability of New Evidence: The District bases its request for reconsideration in part upon the availability of relevant evidence which the District claims, in the exercise of reasonable diligence, could not have been produced prior to the close of the hearing record. SWRCB regulations do not contemplate that a party unsatisfied with a water right order may obtain reconsideration simply by gathering additional data or commissioning additional scientific reports. The SWRCB has discretion whether to grant reconsideration. The circumstances under which the SWRCB is required to hear and consider new evidence are narrow.

In addition to modification in Order WR 95-17, Mr. Evans' petition suggests several changes in SWRCB water right hearing procedures. Mr. Evans' requests for general changes in SWRCB hearing procedures are not a proper subject for resolution in the present context of a petition for reconsideration of Order WR 95-17.

The language of the SWRCB regulation allowing petitions for reconsideration on the basis of "relevant evidence which, in the exercise of reasonable diligence, could not have been produced" at the hearing, is identical to the wording of a statute allowing a reviewing court to remand an adjudicatory decision to an administrative agency to hear new evidence. (Compare Tit. 23 Cal. Code Regs., § 768 (c) with Cal. Code Civ. Proc. § 1094.5(e).) A recent Court of Appeal opinion interpreting this language observes:

"[The statute] opens a narrow, discretionary window for additional evidence, newly discovered after the hearing Routine allowance thereunder after the decision would pose for quasi-judicial decisions . . . a threat of repeated rounds of litigation, and uncertain, attenuated finality" (*Fort Mojave Indian Tribe v. California Department of Health Services* (1995) 38 Cal.App.4th 1574 [45 Cal.Rptr.2d 822, 834-35].)

Similar considerations apply to petitions for reconsideration of water right decisions and orders. If the SWRCB grants reconsideration based on new evidence, it must provide other parties an opportunity to cross examine and to present opposing evidence. If the hearing had to be reopened every time a party who is unhappy with a decision or order produced a new study, data, or scientific interpretation, the hearing process could go on indefinitely.

As the Court of Appeal held, the requirement to reopen the hearing for consideration of post-hearing evidence "generally has been limited to truly new evidence, of emergent facts." (*Id.*, 45 Cal. Rptr. at 835.) The evidence offered by the District does not meet that test. The evidence in the record includes data from over ten years of fishery studies. The additional evidence

now offered by the District is largely consistent with, and an extension of, evidence which is already in the record.

One example of the "new evidence" cited by the District is the reported presence of salmon and salmon redds in Lagunitas Creek at flows less than 35 cfs during late October and mid-November of 1995. The District argues that this "new evidence" shows that coho salmon can enter the creek and reach upstream spawning areas at flows "far less than the 35 cfs earlier studies indicated." (Memorandum of Points and Authorities, pp. 17 and 18.) Contrary to the District's contention, the proposed additional evidence would not augment the record in any significant way. Order WR 95-17 expressly recognizes that some salmon have historically migrated upstream at flows of less than 35 cfs for a 3-day period. (Order WR 95-17, p. 53.) The SWRCB's determination that flows of 35 cfs for a 3-day period must be provided for upstream salmonid migration was based, in large part, on the expert testimony presented by the District regarding the desirable level of flows for upstream migration. (Order WR 95-17, pp. 52 and 53.) The reported presence of a very few salmon in the stream at flows of less than 35 cfs during late October and mid-November of 1995 does not conflict with evidence in the record that the higher upstream migration flows established in Order WR 95-17 are desirable.

Order WR 95-17 requires the District to develop and implement a fishery monitoring program. If the data collected through that program over a reasonable period of time support amendment of the District's permits, then the SWRCB can consider proposed revisions at that time. The availability of the additional evidence cited in the District's petition does not justify reopening the hearing record or reconsideration of Order WR 95-17.

Alleged Exclusion of Evidence Resulting in Denial of a Fair Hearing: The District's second basis for requesting reconsideration relates to several proposed exhibits concerning the subject of salmon migration and imprinting⁴ which are not a part of the hearing record. The District alleges that it was "prevented from presenting additional rebuttal testimony by the hearing officer, Mr. Samaniego, who halted the District's rebuttal testimony. ..." Arguing that the hearing officer's actions prevented it from introducing further evidence on the issue of salmon imprinting, the District contends that it was "prevented from having a fair hearing on this issue and submits the evidence that it would have presented at that time in this petition." (Memorandum of Points and Authorities in Support of Marin Municipal Water District's Motion for Reconsideration of Order No. WR 95-17, p; 29.)

The District has submitted four technical articles and a book on the subject of salmon migration and imprinting which it proposes be added to the record. (Proposed Exhibits H, I, J, K, and L submitted with the District's petition for reconsideration.)⁵ The proposed exhibits were available at the time of the 1992 hearing, but allegedly were not included in the hearing record due to a ruling from the hearing officer.

In considering the District's argument that it was prevented from introducing the specified exhibits into evidence, we look to the relevant pages of the hearing transcript. (T IX, 113:21-124:10.) The transcript shows that the District did not offer any of the newly proposed exhibits into evidence during the hearing.

⁴ *Imprinting is the process that influences young salmon and steelhead to return to their natal stream at the time of spawning. •*

⁵ *In contrast to fishery and water quality data collected following the close of the water right hearing, the District's proposed new exhibits regarding the subject of imprinting were all in existence well before the 1992 hearing.*

Similarly, the transcript reveals no ruling from the hearing officer which prevented the District from offering the proposed exhibits into evidence. Consequently, there is no basis for the District's assertion that it was "prevented from having a fair hearing" or prevented from presenting the exhibits into evidence during the water right hearing.⁶

Substantial Evidence: The District's third basis for requesting reconsideration of Order WR 95-17 is the contention that the order is not supported by substantial evidence. From the explanation presented in the District's memorandum of points and authorities, the District's substantial evidence argument appears to be directed primarily at: (1) the requirements in Order WR 95-17 regarding the timing and need for upstream migration flows; (2) the absence of provisions proposed by the District for dry and critical water years; and (3) the prohibition on the pumping and release of water from Nicasio Reservoir for meeting instream flow needs in Lagunitas Creek between Peters Dam and the confluence of Lagunitas Creek and Nicasio Creek.

Order WR 95-17 contains numerous citations to documents and testimony in the evidentiary record in support of the SWRCB's findings. The June 30, 1995 Staff Analysis provides more detailed discussion of the evidentiary record and the issues

⁶ On page 113 of the May 13, 1992 hearing transcript, counsel for the U.S. Fish and Wildlife Service inquired about the scope of proposed rebuttal testimony. Counsel for the District responded that he had "some additional rebuttal testimony on monitoring, on imprinting, on the spawning, the range of spawning flows that were studied." (T IX, 113:25- 114:3.) Counsel made no mention of any of the exhibits the District now proposes to introduce, and characterized his proposed rebuttal evidence as "fairly brief rebuttal testimony." (T IX 114:8-114:10.) The hearing officer responded with the request that counsel for the District "attempt to keep it brief." (T IX, 114:11-114:12.) The District presented testimony by biologist Wayne Lifton on the subject of imprinting as reported on pages 119 through 123 of the May 13, 1992, transcript. The witness concluded his testimony on the subject of imprinting with the statement "That's in short what I wanted to say, and I think that's the end of it." (T IX, 123:17-123:18.) Counsel for the District did not offer into evidence any of the articles or the book now submitted with the petition for reconsideration as Proposed Exhibits H through L.

addressed in Order WR 95-17. The fact that the District may disagree with some of the SWRCB's findings, or that there is conflicting evidence on a particular issue, does not mean that the record lacks substantial evidence which supports the findings and requirements of the order. Similarly, the requirement for substantial evidence in support of the order does not mean that the provisions of the order must be limited to those specifically recommended by the witnesses at the hearing. The SWRCB is free to examine the evidentiary record as a whole and to reach conclusions based upon its understanding and interpretation of the entire record.

Conclusions Regarding Legal Grounds Cited by the District for Requesting Reconsideration: For the reasons discussed above, the SWRCB concludes that the legal grounds for requesting reconsideration cited in the District's petition are without merit. There is substantial evidence in support of Order WR 95-17; the District was not denied a fair hearing; and the additional evidence developed following the close of the hearing record does not provide a sufficient basis for reopening the hearing process.

4.2 Modifications to Order WR 95-17 Requested by the District

Although the legal grounds for requesting reconsideration cited by the District are without merit, a brief examination of the District's proposed modifications to Order WR 95-17 helps provide a better understanding of the requirements established by the order.

Upstream Migration Flows and Fall Spawning Flows: Order WR 95-17 requires an increase in flow from the "summer" requirement of 8 cfs (6 cfs in dry years) to 20 cfs beginning between November 1 and November 15 depending on flow conditions in a particular year. In addition, the order provides for four "upstream migration flows" or pulse flows of 35 cfs for a period of 3 days

each, beginning between November 1 and February 1 of the succeeding year. (Order WR 95-17, pp. 109-112.) The District's petition proposes that the requirements be amended to require a minimum of only two upstream migration flows beginning as late as December 29 of each year, depending upon hydrologic conditions.

The District's petition for reconsideration does not address the subject of the base instream flow requirement which would apply between November 1 and December 29. If the District proposes simply to eliminate two of the 3-day upstream migration flows required under Order WR 95-17, the maximum water supply impact to the District would be a savings of approximately 180 AF.⁷ Although not addressed in the District's petition, the District's accompanying memorandum of points and authorities appears to propose alternative minimum instream flow requirements which provide for no increase in the base instream flow level until as late as December 15. (Memorandum of Points and Authorities, p. 26.) Rather than going from summer flows of 8 cfs (6 cfs in dry years) to fall flows of 20 cfs on November 1 (or November 15) as required under Order WR 95-17, the District's proposal could result in maintaining the summer flow level until as late as December 15. In other words, the District apparently proposes to delay the beginning of higher flows for upstream migration and spawning purposes for a period of 30 days.⁸

⁷ Order WR 95-17 requires a minimum base flow of 20 cfs for fishery protection beginning between November 1 and November 15 of each year (depending on hydrologic conditions in the year in question) and extending through March 31 of the next year. Each 3-day upstream migration flow of 35 cfs would require approximately 90 AF of additional water. If the only change were to eliminate two of the four upstream migration flows, while keeping the base flow requirements the same, the maximum water savings to the District would be approximately 180 AF.

⁸ Delaying the increase in base flows until the time of an upstream migration flow beginning as late as December 29 would result in maintaining the summer flow levels even longer. From the District's petition for reconsideration, the SWRCB cannot determine with any certainty what base flows the District proposes for the period of November 1 through December 29.

Delaying the required increase in flow until December 16 would result in significant water savings for the District, but it would also result in a drastic reduction of suitable upstream migration conditions and spawning habitat during the important fall upstream migration and spawning period. For example, a minimum flow of 20 cfs, as required under Order WR 95-17, provides approximately 70 percent of estimated available spawning habitat for coho salmon. In contrast, a flow of 8 cfs would provide only 20 percent of available spawning habitat, and 6 cfs would provide only 14 percent of available spawning habitat. (SWRCB 7, p. 24:) Whether compared to the requirements of Order WR 95-17 or the interim requirements under the 1985 stipulated judgment, the District's proposal would substantially reduce the period during which flows in Lagunitas Creek are suitable for upstream migration and spawning.

The District argues that "[r]equiring fall passage flows [upstream migration flows] too early in the season, when coho salmon are not able to take advantage of these releases, would be a waste of precious stored reservoir water." (Memorandum of Points and Authorities, p. 17.) In the same paragraph of its Memorandum of Points and Authorities, however, the District goes on to state that recent observations showed coho spawning activity in Lagunitas Creek during late October and mid-November of this year. (Memorandum of Points and Authorities, p. 1,7.)⁹

⁹ Prior to entry of Order WR 95-17, minimum flows in Lagunitas Creek were subject to the terms of a 1985 stipulated judgment. Information submitted by the District states that, on October 15, 1995, the District increased the flow to 20 cfs as required at that time. (Letter dated December 20, 1995 from Trihey and Associates to Dana Roxon of Marin Municipal Water District.) Following adoption of Order WR 95-17 on October 26, 1995, however, the District states that it began reducing flow in Lagunitas Creek to the lower level allowed under the order. The District states that on October 27, 1995, it stopped reducing flow further due to the reported presence of coho salmon, and salmon redds in the stream. (District's Memorandum of Points and Authorities, p. 17.)

The reported presence and upstream migration of coho salmon in Lagunitas Creek on October 27, 1995, is consistent with the findings of Order WR 95-17 that
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The reported presence of salmon in the stream at that time would be consistent with the provisions of the Order WR 95-17 which require a 3-day long upstream migration flow beginning November 15 if such a flow has not occurred earlier. In contrast, the District's proposal to continue minimum flows of as low as 6 cfs until as late as December 15 would undermine successful upstream migration and spawning of coho salmon during the fall.

Order WR 95-17 requires the District to establish a fishery monitoring program following consultation with state and federal fishery agencies and approval of the Chief of the Division of Water Rights. If the results of a future monitoring program show that fish in Lagunitas Creek would benefit from revisions to the flow requirements established in Order WR 95-17, the SWRCB could exercise its continuing authority and revise the applicable terms in the District's permits at that time. Neither the evidence presently in the record nor the additional evidence which the District seeks to introduce, however, would justify the changes in minimum instream flow requirements which the District proposes.

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"upstream migration generally appears to coincide with the decline in flow following a runoff event." (Order WR 95-17, p. 51.) There is no indication of storm activity between October 15 and October 27 in the information submitted by the District. The reported appearance of salmon on October 27, however, coincides with the decline in flow following several days of higher flows due to release of stored water.

The SWRCB notes that the fishery migration information which the District submitted with their petition is subject to varying interpretations and that the flows reported by the District are not consistent with preliminary flow data from the USGS. Although it is possible that evidence developed through the required fishery monitoring program could justify revisions in the future, the anecdotal information submitted by the District in connection with its petition is insufficient to justify reconsideration of Order WR 95-17.

District Responsibility for Meeting Minimum Flows: Order WR 95-17 requires that the District bypass or release sufficient water from Kent Lake to meet specified flow requirements in Lagunitas Creek as measured at the United States Geological Survey gage located at Taylor State Park. When the unregulated flow in the stream from sources downstream of Kent Lake is not sufficient to meet the minimum flow requirements, the unregulated flow must be supplemented with water bypassed or released from Kent Lake. The District's petition for reconsideration proposes that the order be modified to provide that the District would meet the specified flow requirements if either: (1) the requirements are met at Taylor State Park as presently required, or (2) the District provides, at the Shafter Bridge gage, at least 75 percent of the flows required in the winter and 90 percent of the flows required in summer.¹⁰

The District argues that its proposal is justified because the requirements specified in Order WR 95-17 would, at times, result in flows in excess of what would be present at the State Park gage under natural conditions. Water development in the Lagunitas Creek basin, however, has greatly reduced the amount of fishery habitat as compared to pre-development conditions. In situations where reservoir construction has significantly altered the character of a watershed, it is not unusual to require release of stored water to meet instream needs. (See, e.g., SWRCB Decision 1631 (1994) at pp. 10, 65-66; SWRCB Order

¹⁰ *The District's petition for reconsideration urges establishment of alternative flow requirements to be met at either of two gaging stations. At the time of the hearing, however, the District proposed that minimum flow requirements would be measured only at the State Park gage, as was ultimately required under Order WR 95-17. (MMWD 2, p. 6-2; MMWD 7, Table 22 (a).) Similarly, DFG proposed flow recommendations for Lagunitas Creek to be measured only at the State Park gage. (SWRCB 7, p. 32.) The fact that the District proposed flow measurements at the single location required under Order WR 95-17 undermines its current objection to the flow measurement approach adopted by the SWRCB.*

No. WR 90-16 at pp. 8-9. See also SWRCB Order No. WQ 89-18 at pp. 5-6.)¹¹ In this instance, the SWRCB believes it is reasonable to require District reservoirs to be operated in a manner that, at times, augments natural flow in the portion of the stream which remains accessible to anadromous fish. Although the District's proposal would reduce the District's obligation to release water from storage during dry periods, it would also periodically reduce the amount of habitat for coho salmon and steelhead in Lagunitas Creek below the levels protected under Order WR 95-17.

Critical Year Flow Requirements: The District's petition proposes that Order WR 95-17 be modified to provide for "critical year" instream flow requirements equal to 75 percent of the "dry year" flows specified in Order WR 95-17. The District's memorandum of points and authorities argues that, based on the historical record, critically dry years "occur approximately once every fifty years." (Memorandum of Points and Authorities, p. 23.)

Order WR 95-17 establishes minimum flow requirements for normal and dry years, with the dry year requirements expected to apply an average of once in six years. Due to the need for water for municipal needs, Order WR 95-17 establishes dry year flow requirements which are well below the flow recommendations of

¹¹ Recent legislation provides for the designation of precedent decisions, so that persons participating in adjudicatory proceedings before an agency have access to decisions which may be relied on as precedent. (See Cal. Gov. § 11425.10, added by Stats. 1995, Ch. 938, § 21 p. 5538, eff. July 1, 1997.) It has been the SWRCB's practice to treat its decisions and orders as precedent. Of course, a prior decision or order may be distinguished or overturned by a later decision or order. Nevertheless, the treatment of SWRCB decisions and orders as precedent helps provide greater consistency and predictability in agency decision making. Recent decisions and orders are readily accessible, including availability on the SWRCB Internet site (<http://www.swrcb.ca.gov>) and the Lexis and Westlaw databases. Accordingly, the SWRCB designates all decisions or orders adopted by the SWRCB at a public meeting to be precedent decisions, except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the SWRCB.

DFG. The SWRCB recognizes, however, that in an extreme drought or other unusual conditions, it may be necessary to modify the requirements established in Order WR 95-17. Consequently, Order WR 95-17 provides for a procedure under which the District can request temporary modification of the flow or water temperature requirements which would otherwise apply. (Order WR 95-17, pp. 112-114.)

With respect to the District's request to establish modified flow requirements for "critical year" conditions, the SWRCB prefers to rely on the provisions in Order WR 95-17. Under the existing provisions of the order, relief from specified flow or water temperature requirements can be tailored to meet the specific conditions existing at the time relief is needed. This procedure allows for maximum flexibility to meet unforeseen conditions. It is unreasonable to assume that the SWRCB can prescribe appropriate relief measures at the present time for unknown critical conditions expected to occur once during the next 50 years.

Use of Nicasio Reservoir Water to Meet Flow Requirements in Lagunitas Creek: The District's final requested modification in Order WR 95-17 is to allow the District to pump water from Nicasio Reservoir for release below Peters Dam to meet the instream flow requirements for fishery protection in Lagunitas Creek. The District argues that water from Nicasio Reservoir can be used for meeting instream flow requirements in Lagunitas Creek without hurting the fishery due to increased turbidity or problems related to salmonids imprinting upon water from Nicasio Reservoir.

The release of Nicasio water for instream flow purposes in Lagunitas Creek was acknowledged on an interim basis under Decision 1582 and the stipulated judgment in effect prior to entry of Order WR 95-17. Water Right Permit 12800, however, does

not specify fishery protection in Lagunitas Creek among the authorized purposes and places of use for water diverted from Nicasio Creek under the permit.¹² If fishery protection in Lagunitas Creek were to be added as an authorized purpose and place of use under Permit 12800, the District first would have to file a petition to amend the permit. Then the SWRCB would provide notice of the requested change to potentially affected parties and provide an opportunity for hearing on any unresolved protests. The District's proposal to amend Order WR 95-17 to allow use of Nicasio Reservoir water for meeting instream flow requirements in Lagunitas Creek ignores the fact that the proposed use must be authorized in accordance with applicable statutory requirements. (Water Code Section 1700 et seq.)

For reasons discussed in Section 4.1, the SWRCB believes there is insufficient justification to reopen the water right hearing in this proceeding for consideration of the District's proposed evidence regarding imprinting and water turbidity. The proper forum in which the District could present its proposed exhibits on imprinting and turbidity would be in a proceeding regarding a petition to amend Permit 12800 to authorize use of Nicasio Reservoir water for fishery protection in Lagunitas Creek.

As discussed on pages 81 through 94 of Order WR 95-17, the release of Nicasio Reservoir water into Lagunitas Creek below

¹² Use of water for fish and wildlife purposes- at Nicasio Reservoir is among the authorized purposes and places of use authorized under Water Right Permit 12800. No change in Water Right Permit 12800 is necessary for the District to bypass or release to Nicasio Creek concurrent inflows to Nicasio Reservoir because the release does not involve any appropriation of water. (See SWRCB Order WR 95-6 at 13.) Where diversions to storage or diversions from one creek to another are involved, however, the diversion and use are not authorized except in accordance with a permit issued by the SWRCB. (See Water Code Section 1052.)

Peters Dam is not desirable for a number of reasons.¹³ Therefore, it appears very questionable that a petition to authorize use of Nicasio Reservoir water to meet fishery needs in Lagunitas Creek would be approved.

Conclusions Regarding Changes Proposed by the District: Order WR 95-17 established a number of requirements which, taken together, will provide the conditions necessary to protect fishery resources in Lagunitas Creek. Those requirements were established based on a careful balancing of fishery needs and the very important needs for water from Lagunitas Creek for consumptive use. Each of the revisions proposed by the District would result in less desirable conditions for coho salmon and steelhead in Lagunitas Creek. The SWRCB believes that the requirements of Order WR 95-17 were well supported by substantial evidence in the record, and that those requirements should not be revised based on any of the arguments presented in the District's petition for reconsideration.

5.0 ISSUES RAISED IN OTHER PETITIONS

The petitions for reconsideration filed by Willis Evans, the Sierra Club, and the Tomales Bay Association do not strictly comply with the requirements for petitions for reconsideration set out in Sections 768 and 769 of Title 23 of the California Code of Regulations. For example, Evans' petition contains, no statement or other indication that it has been sent to other parties to the proceeding and no memorandum of points and authorities in support of the legal argument that the SWRCB has not met its obligation under the public trust doctrine. The petition filed by the Sierra Club does not cite any of the

¹³ In addition to the turbidity and imprinting issues which the District addresses in its petition for reconsideration, Order WR 95-17 also discusses water temperature considerations, the effect of Nicasio Reservoir water on recreation and aesthetics in the Samuel P. Taylor State Park, and violation of water quality objectives established in the Water Quality Control Plan for the San Francisco Bay Basin. (Order WR 95-17; pp. 112-114.)

specified bases for requesting reconsideration authorized under Section 768.¹⁴ Similarly, the Tomales Bay Association petition argues that Order WR 95-17 does not reflect evidence from the record supporting higher spring and summer flows, but the petition does not cite any of the specific grounds for reconsideration authorized under Section 768.

Although the petitions filed by Evans, the Sierra Club, and the Tomales Bay Association do not comply with applicable procedural requirements, the changes requested in the petitions are addressed below in order to promote a better understanding of Order WR 95-17.

Attraction Flows: Evans requests the opportunity to present additional evidence to show attraction flows are a valid recognized requirement for anadromous fish. The subject of attraction flows is addressed on pages 51 and 52 of Order WR 95-17. Based on review of historical data, the order concluded that upstream migration of salmonids did not appear to be triggered by a specific flow. Rather, upstream migration appears generally to coincide with the decline in flow following a runoff event. Based on evidence presented by the District, Order WR 95-17 provides for four upstream migration flows for periods of three days each, but does not require additional releases of water for attraction purposes.

The Department of Fish and Game recommended an attraction flow requirement of up to 100 cfs. In the absence of specific studies or data supporting that recommendation, however, Order WR 95-17

¹⁴ *The Sierra Club Marin Group argues that expert testimony calling for higher flows from June 15 to November 1 (or November 15, depending upon the year) was "ignored." Order WR 95-17 discusses conflicting testimony on the subject of summer fish flows at length. The fact that any particular expert's recommendation was not established as a minimum flow requirement does not mean that the expert's testimony was ignored. Rather the recommendation may have been considered, but rejected, due to conflicting testimony or competing uses for water.*

concluded that the record did not support adoption of an attraction flow requirement. Evans' petition stresses why he believes that attraction flows are important, but it does not identify any specific studies or data that provide a sufficient evidentiary basis for establishing a quantified attraction flow requirement for Lagunitas Creek.

Higher Minimum Flow Requirements from May 1 through November 15: Evans, the Sierra Club, and the Tomales Bay Association all request revision of Order WR 95-17 to require higher minimum flows during some or all of the period from May 1 through November 15. Each of the petitions refers to evidence in the record supporting establishment of higher minimum flows during that period for coho salmon and steelhead. The SWRCB acknowledges that the record supports the conclusion that higher minimum flows would benefit coho salmon and steelhead. The minimum flow requirements established in Order WR 95-17, however, were based up a balancing of competing interests, including the compelling need for water from Lagunitas Creek to serve consumptive uses. Although higher flows would benefit coho salmon and steelhead, the flows established in Order WR 95-17, in combination with the other fishery protection measures required in Order WR 95-17, will maintain fish in good condition. The SWRCB is not persuaded to change the minimum flow requirements established in Order WR 95-17 based on any arguments or evidence referred to in the petitions for reconsideration.

Flows to the Lagunitas Creek Estuary: The Tomales Bay Association requests reconsideration based on the contention that the "importance of freshwater inflow to the Lagunitas Creek Estuary has been understated." Order WR 95-17 recognized the presence of Neomysid shrimp (opossum shrimp) and other species in the estuary portion of Lagunitas Creek below the present site of the Giacomini dam. (Order WR 95-17, pp. 97-102.) The Tomales Bay Association presented limited testimony during the hearing on

the need for higher flows in April, May, and June to provide more habitat for Neomysid shrimp. That testimony was not the result of detailed study or rigorous analysis, and it does not provide a sufficient basis for establishing a specific flow requirement to benefit the estuary portion of Lagunitas Creek. Neomysid shrimp and other estuarine species should benefit from the removal of the Giacomini dam from its present location and from the revised flow requirements established under Order WR 95-17.

Measurement of Instream Flows at State Park Gage and USGS Gage in Point Reyes: Order WR 95-17 establishes specified minimum flow requirements to be met at the State Park gage. Evans' petition also requests that, in order to provide minimum flows throughout Lagunitas Creek below Peters Dam, the required instream flows should be measured at both the State Park gage and the USGS gage near Point Reyes. Order WR 95-17 specifies the State Park gage as the measurement location for instream flows due to the fact that: (1) it is located within the stream reach which provides the highest quality spawning and rearing habitat for salmonids; and (2) it is the measurement location referred to in the Department of Fish and Game recommendations, the District recommendations and much of the testimony at the hearing. Order WR 95-17 requires the District to establish a fishery monitoring program. If the results of the monitoring program and future flow data show that requiring minimum flow requirements to be met only at the State Park gage provides insufficient protection to fishery resources, the SWRCB could amend the District's permits to establish a second measurement location as appropriate. The present record, however, does not demonstrate the need for a permit condition requiring that the specified minimum flows be met at the USGS gage near Point Reyes.

Use of Nicasio Reservoir Water to Supplement Minimum Flows in Lagunitas Creek: The history of the use of water from Nicasio Reservoir for meeting instream flow requirements in Nicasio Creek

and, later, in Lagunitas Creek, is discussed on pages 81 through 84 of Order WR 95-17. Order WR 95-17 revised the minimum flow requirements for Lagunitas Creek and expressly prohibits the District from meeting those requirements with water pumped from Nicasio Reservoir for release into Lagunitas Creek below Peters Dam. Evans' petition for reconsideration suggests that, in addition to the instream flow requirements established in Order WR 95-17, a total of 2,000 acre-feet of water from Nicasio Reservoir should be made available at the discretion of the Department of Fish and Game for improvement of fish life in Lagunitas Creek.

By memorandum dated September 19, 1995, the Department of Fish and Game advised the SWRCB that all water released by the District to meet flow and temperature requirements in Lagunitas Creek should come from Kent Lake.¹⁵ The problems associated with releasing Nicasio Reservoir water into Lagunitas Creek below Peters Dam are discussed on pages 84 through 94 of Order WR 95-17. In addition to those problems, adoption of Evans' recommendation would reduce the amount of water available to meet the District's consumptive needs. Therefore, the SWRCB concludes that Order WR 95-17 should not be revised in the manner requested.

Conclusion Regarding Changes Requested by Evans, the Sierra Club Marin Group, and the Tomales Bay Association: The provisions of Order WR 95-17 were established based on a careful balancing of the needs of the fishery in Lagunitas Creek and the need for water to meet other competing demands. Some of the revisions requested by Evans, the Sierra Club, and the Tomales Bay Association would benefit various species of fish, but would reduce the amount of water available for meeting competing needs.

¹⁵ Memorandum from John Turner to Edward Anton commenting on draft of Order WR 95-17.

The SWRCB concludes that the petitions for reconsideration filed by Evans, the Sierra Club, and the Tomales Bay Association do not provide a sufficient basis for reopening the record or for revising Order WR 95-17 in the manner requested.

6.0 CONCLUSION

For the reasons discussed above, the SWRCB concludes that the petitions for reconsideration filed by the District, Evans, the Sierra Club, and the Tomales Bay Association should be denied.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration filed by Marin Municipal Water District, Willis Evans, the Sierra Club Marin Group, and the Tomales Bay Association are denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 18, 1996.

AYE: John P. Caffrey
 Mary Jane Forster
 Marc Del Piero
 James M. Stubchaer
 John W. Brown

NO: None ABSENT:

None ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board