

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2002 - 0022 - EXEC

In the Matter of Permit 20399 (Application 29001),
NEW EDUCATION DEVELOPMENT SYSTEMS, INC.

SOURCE: Swartz Creek, Upper Putah Creek Watershed
COUNTY: Napa County

ORDER ON PETITION FOR RECONSIDERATION
BASED ON SETTLEMENT AGREEMENT BETWEEN THE PARTIES
TO HOLD IN ABEYANCE THE DECISION DENYING A PETITION FOR AN
EXTENSION OF TIME FOR PERMIT 20399 (APPLICATION 29001) PENDING
TIMELY COMPLETION OF ENVIRONMENTAL DOCUMENTATION

BY THE EXECUTIVE DIRECTOR:

This matter comes before the State Water Resources Control Board (SWRCB) on a petition for reconsideration of a decision by the Division of Water Rights (Division) to deny a petition for an extension of time for Permit 20399, held by New Education Development Systems, Inc. (hereinafter NEDS or Petitioner). In this order, the Executive Director holds the Division's decision to deny the time extension in abeyance pending timely completion of the required environmental documentation.

1.0 INTRODUCTION

The SWRCB Division of Water Rights issued Permit 20399 (Application 29001) to NEDS on December 5, 1989, for proposed water storage of up to 96 acre feet per annum, in the Upper Putah Creek watershed. The project contemplates the development of two storage reservoirs for the purpose of irrigating a golf course. The permit terms require that permittee complete construction by December 31, 1993, and completely apply water to beneficial use by December 31, 1994.

In 1990, Solano County Water Agency (SCWA) initiated the adjudication of all water rights in the Upper Putah Creek watershed. Negotiations between SCWA, U.S. Bureau of Reclamation, and the Upper Putah Creek water users (including permittee), resulted in the March 10, 1995 Condition 12 Settlement Agreement. On February 27, 1996, the SWRCB issued Order 96-002 modifying the conditions of permits and licenses in order to implement the Settlement Agreement. The Settlement Agreement establishes a limited quantity of water that can be used by the Upper Putah Creek water users. Once the supply is exhausted, the Division can issue no further appropriative water rights in the watershed. If existing permittees and licensees do not maintain their water rights, the Watermaster will add the unused project water to the reservation of water for that county and that water will become available for new users.

The two reservoirs listed in Permit 20399 have not been built. On July 27, 1999, permittee filed a Petition for Extension of Time, seeking a time extension to complete construction of the proposed reservoirs and to complete full beneficial use of the water under Permit 20399. The Division issued notice of the petition on March 16, 2001.

By letter dated April 18, 2002, the Division requested that permittee provide certain documentation to establish the permittee's due diligence in pursuing the project under the permit. The Division requested documentation of various use permits, a Streambed Alteration Agreement from the Department of Fish and Game (DFG), Progress Reports from 1998 to the present, and proof of adequate financing for construction of the project. In addition, the Division requested that NEDS provide a work plan, including an acceptable timeline, showing the steps the permittee intends to take to develop the reservoirs. Permittee did not provide the requested information. The Division Chief issued an order on July 16, 2002, which denied the Petition for Extension of Time for Permit 20399. Petitioner timely filed a Petition for Reconsideration.

2.0 LAW GOVERNING RECONSIDERATION

The SWRCB may order the reconsideration of decisions on its own motion or by the filing of a petition by an interested party within 30 days of adoption of the decision. (Wat. Code § 1122.) The SWRCB regulation 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."

(Cal. Code Regs., tit. 23, § 768.)

3.0 CAUSES FOR RECONSIDERATION

The Petitioner sets forth three grounds for reconsideration of the Division's order: (1) that there were irregularities in the proceeding that led to the order; (2) that the order is not supported by substantial evidence; and (3) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced. Because I find the third cause compelling, and the Division and Petitioner have agreed on an alternative resolution in this matter, I need not address the first two alleged causes for reconsideration.

Petitioner submits that NEDS could not provide the information requested in the Division's April 18, 2002 letter because it was engaged in litigation with its tenant, Aetna Springs Resort (Aetna). Apparently in January 1998, NEDS entered into a lease agreement with Aetna for the development of the property, and in 1999, Aetna filed suit over the terms of the lease agreement. The parties engaged in mediation and two arbitration hearings, the most recent in March 2002. At the time the Division requested that NEDS submit specific information regarding the status of the project, both parties were still awaiting a decision from the March 2002 arbitration hearing. Petitioner sent a letter requesting more time to submit the requested information because it was not possible to complete a work plan or timeline absent a final arbitration agreement. Petitioner now has received a copy of the final arbitration agreement (dated July 1, 2002), and can proceed to prepare a timeline and furnish other necessary information to the Division. While it is not clear why the agreement, received by NEDS July 12, was not sent immediately to the Division, and there is some debate over why NEDS could not furnish other information requested by the Division, I find that the arbitration agreement is sufficiently new and relevant evidence that could not otherwise be obtained prior to the issuance of the order. The existence of the final

arbitration agreement between Petitioner and its long-term tenant will remove any barriers preventing the timely diligence in proceeding with the project and warrants reconsideration of this matter.

4.0 THE DENIAL OF THE TIME EXTENSION WILL BE HELD IN ABEYANCE PENDING TIMELY CEQA COMPLIANCE

Both the Division and Petitioner have agreed on an alternative resolution of this matter, specifically to hold the time extension denial in abeyance pending completion of the required environmental documentation.

The California Environmental Quality Act (CEQA) applies to discretionary projects proposed to be carried out or approved by public agencies. (Pub. Resources Code, § 21080.) The SWRCB's decision whether to grant an extension of time is a discretionary act subject to CEQA.

(Cal. Code Regs., tit. 14, § 15002, subd. (i); see tit. 23, § 844 [identifying factors to evaluate when considering a request for extension of time].) Because the SWRCB's approval of a time extension and subsequent amendment of Permit 20399 would authorize NEDS to complete the project and to apply water to beneficial use, the SWRCB's approval constitutes an approval of the project. Thus, the SWRCB is the lead agency for purposes of considering whether to approve the petition. The Division has provided Petitioner with the standard Memorandum of Understanding for Preparation of Environmental Documents (MOU). The MOU establishes the terms and conditions for the Petitioner to hire an independent, qualified contractor to provide for the preparation of a CEQA document for the SWRCB's use.

The SWRCB cannot approve any time extension without compliance with CEQA. Accordingly, the Permittee has twenty-four months from the adoption date of this Order to comply with CEQA and complete a CEQA document that is acceptable to the SWRCB. Absent compliance with CEQA by the above date, the Division's decision denying the time extension will become effective. The two-year time allotment in which to complete CEQA should not act to delay other actions Petitioner must take to diligently pursue the project. Petitioner should proceed with other steps necessary for timely completion of the project, other than project construction and related activities that should not be initiated before CEQA compliance, in addition to complying with the directive of this Order.

5.0 CONCLUSION

Petitioner has provided new evidence, specifically the final arbitration agreement between NEDS and its tenant, Aetna, that provides cause to reconsider this matter. Both the Petitioner and the Division have agreed on an alternative course of action, which is to proceed with CEQA compliance in a timely manner. Accordingly, the Division's decision denying the time extension will be held in abeyance pending completion of the CEQA documentation required for a time extension of Permit 20399. In addition, the permittee should submit a work plan, including an acceptable timeline, showing the steps the permittee intends to take to develop the reservoirs and place of use. The work plan should include proof of financing for the permitted facilities, including development of the place of use. The permittee should also furnish the Progress Reports by Permittee from 1998 to the present within 30 days of the date of the issuance of this order.

ORDER

IT IS HEREBY ORDERED THAT the Division's Decision denying a time extension is held in abeyance pending timely completion of a CEQA document that is acceptable to the SWRCB. If acceptable environmental documentation is not completed within twenty-four months of the date of issuance of this Order, the Division's decision denying the Petition for Extension of Time will be deemed effective immediately, triggering the time period to file a Petition for Reconsideration under Water Code section 1122. Permittee shall submit an adequate workplan and overdue Progress Reports within 30 days of the issuance of this Order.

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This order does not serve as a de-facto time extension or a finding that the permittee has exercised due diligence in pursuing the project described in Permit 20399. If, within twenty-four months, the Division receives an acceptable CEQA document, the Division will evaluate the merits of any time extension petition based on title 23, California Code of Regulations, section 840 through 848, and may grant or deny the time extension at that time. Petitioner may file a petition for reconsideration not later than 30 days from the issuance of the decision on the time extension.

Dated: 11/20/02

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/s/
Celeste Cantú
Executive Director