

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0013-EXEC

---

In the Matter of Petition for Reconsideration of  
**DAVID SCHWINDT**  
Regarding Order Canceling Application 29744

---

**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR:<sup>1</sup>

**1.0 INTRODUCTION**

On April 14, 2009, the State Water Resources Control Board's (State Water Board) Division of Water Rights (Division) issued an order canceling Application 29744 held by David Schwindt, Liv Schwindt, Riendo Arroyo and Paulette Arroyo. The application was cancelled for failure to submit information requested by the Division of Water Rights (Division) pursuant to Water Code section 1334 and for non-diligence. David Schwindt (Petitioner) filed a petition for reconsideration on May 27, 2009. Petitioner requests that the State Water Board reinstate Application 29744, and change the names on the application to reflect only David P. Schwindt and Liv E. Schwindt, as the sole owners of the property.

**2.0 GROUND FOR RECONSIDERATION**

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs.,

---

<sup>1</sup> State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of petitions for reconsideration of an order canceling an application falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the order.

tit. 23, § 768.)<sup>2</sup> The legal bases for reconsideration are: (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; or (d) error in law.

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

### **3.0 LEGAL AND FACTUAL BACKGROUND**

David Schwindt, Liv Schwindt, Riendo Arroyo and Paulette Arroyo (Applicants) filed Application 29744 with the Division on August 10, 1989, for the right to store 60 acre-feet per annum (afa). The application was accepted on May 14, 1990.

Applicants currently hold Permit 18138 (Application 25546), which authorizes storage of 15 afa in a 26 acre-foot (af) capacity reservoir. Since the capacity of the reservoir exceeds the amount Applicants are authorized to divert to storage under Permit 18138, the Division recommended that Applicants pursue an additional application to cover the unauthorized storage capacity.

On August 2, 1989, the Division issued Preliminary Cease and Desist Order No. 8P (Order) for violation of Permit 18138 for storing more water than authorized by the permit. The Order required Applicants to either reduce the size of the reservoir, or file an application to cover the unauthorized storage. The Order also required Applicants to reduce the size of the dam to a size not subject to the Division of Safety of Dams' (DSOD) jurisdiction, or prove that DSOD had issued a certificate of safety for the dam.

---

<sup>2</sup> All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

Application 29744 requests the right to store 60 af, to cover Applicants' existing unpermitted storage capacity, and the excess to be stored after completion of Applicants' enlargement of their existing 26 af capacity reservoir.

On August 30, 1989, the Division advised Applicants that the Environmental Information form (environmental form) portion of the application had not been received. Applicants requested the Division hold the application in abeyance until the issues regarding dam safety were resolved with DSOD. On March 1, 1991, the Division advised Applicants that the environmental form had not been received, and that the application could not be noticed until the form was completed.

By letter dated March 4, 1991, the Division requested submittal of the environmental form and site photographs and indicated that failure to submit the information within 60 days might result in cancellation of the application pursuant to Water Code section 1271. On April 4, 1991, Division staff contacted DSOD to determine whether Applicants had complied with the requirement to either reduce the dam size or obtain DSOD certification. DSOD had no record of either action having occurred.

On May 11, 1993, the Attorney General's office (AG) advised Applicants that DSOD had referred the matter of compliance with DSOD's requirements to the AG. Unless immediate action was taken to correct the situation, the AG intended to file a petition in superior court to enforce this matter. Since an application had been filed and the AG was handling the DSOD issue, the Division determined that it would not take additional action at that time. On June 7, 1993, the AG reiterated the need to comply with DSOD's dam safety criteria.

On June 16, 1993, the Division reiterated the need for Applicants to submit a completed environmental form and photographs. Applicants were requested to submit the information by July 31, 1993. The Division repeated this request on June 18, 1996 and again on December 16, 1996, and advised Applicants that Application 29744 might be subject to cancellation.

On December 11, 2000, the Division again advised Applicants that the environmental form was required and must be submitted. Division staff sent Applicants a copy of the environmental form on December 27, 2000 and requested the form be returned by January 26, 2001 pursuant to

California Code of Regulations, title 23, section 683. On March 8, 2001, the Division requested that the environmental form be submitted by April 7, 2001.

On May 23, 2002, the Division advised Applicants that the application must be diligently pursued or it would be cancelled. The Division requested Applicants submit the environmental form and photographs by July 22, 2002. On December 7, 2007, the Division again requested Applicants submit the environmental form, and reminded Applicants that immediate attention to this item was required or the application might be cancelled.

To date, Applicants have not submitted the required environmental form and photographs. Accordingly, the application has not been noticed.

On April 14, 2009, the Division issued an order canceling Application 29744. Petitioner filed a petition for reconsideration on May 27, 2009.<sup>3</sup>

#### **4.0 DISCUSSION**

A copy of the Division's April 14, 2009 order canceling Application 29744 was sent to Applicants under cover of letter dated April 15, 2009. That letter advised Applicants that if they disagreed with the order, they could file a petition with the State Water Board for reconsideration within 30 days from the date of the order. The 30-day time limit is established by statute, at Water Code section 1122, which provides, in part:

The board may order a reconsideration of all or part of a decision or order on the board's own motion or on the filing of a petition of any interested person or entity. The petition shall be filed not later than 30 days from the date on which the board adopts a decision or order. The authority of the board to order a reconsideration on its own motion shall expire 30 days after it has adopted a decision or order.

Under section 1122, any petition for reconsideration of the Division's April 14, 2009 order was due no later than May 14, 2009. Petitioner contacted Division staff on May 15, 2009 to

---

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

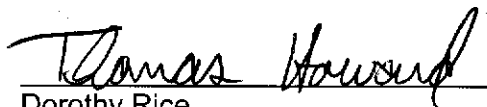
determine how to file a petition for reconsideration. Petitioner filed a petition for reconsideration on May 27, 2009. Because the petition was submitted late, Petitioner's petition for reconsideration cannot be considered. As set forth above, Water Code section 1122 requires that petitions for reconsideration be filed no later than 30 days from the date of the decision. Further, section 1122 provides that the State Water Board's authority to order reconsideration on its own motion expires after 30 days. There is no provision that allows an extension of time to file a petition for reconsideration.

Furthermore, Petitioner has failed to allege any of the legal bases for reconsideration pursuant to section 768. The record shows that Applicants have been repeatedly advised of the need to submit the required environmental form and photographs, and have failed to do so. Based on the above record, the Division's decision to cancel Application 29744 for failure of diligence was correct.

#### ORDER

**IT IS HEREBY ORDERED THAT** because Petitioner failed to submit a timely petition for reconsideration of the Division's order canceling Application 29744, the State Water Board cannot provide Petitioner with the relief requested. The State Water Board also finds that the decision to cancel Application 29744 was appropriate and proper. To the extent that this order does not address all of the issues in the petition for reconsideration, the State Water Board finds that either these issues are insubstantial or that Petitioner has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. Accordingly, David Schwindt's petition for reconsideration is denied.

Dated: 3/16/10

  
Dorothy Rice  
Executive Director