

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2010-0033-EXEC**

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In the Matter of the Petition for Reconsideration of Order Approving Issuance  
Of Permit related to

**South Coast Water District**  
Permit 21256 (Application 31741)

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SOURCE: Aliso Creek

COUNTY: Orange

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**ORDER GRANTING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR:

**1.0 INTRODUCTION**

South Coast Water District (District) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights (Division) Order approving issuance of Permit 21256 (Order). The State Water Board Executive Director finds that the petition raises substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768. The District's petition for reconsideration of the Order is granted. The Executive Director determines that the Order and Permit 21256 shall be remanded to the Division to determine the following:

- 1) Whether the Division should have reduced the District's annual diversion limit from 890 acre-feet to 88 acre-feet;
- 2) Given its intended use, supplemental documentation, and submission of a change petition, whether the District's designated place of use should be enlarged to 330 acres; and

- 3) Whether the Division erred in requiring a 4.77 cubic feet per second (cfs) bypass rather than a 6.0 cfs bypass to protect Southern California steelhead.

To the extent the District raises issues that are not addressed in this order, the Executive Director determines that those issues do not merit further review.

## 2.0 RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds: (1) irregularity in the proceedings or abuse of discretion; (2) the decision or order is not supported by substantial evidence; (3) there is relevant evidence, which in the exercise of reasonable diligence, could not have been produced; or (4) an error in law. (Cal. Code Regs., tit. 23, § 768.)<sup>1</sup>

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. (*Id.*, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

State Water Board Resolution 2007-0057 delegates to the Executive Director the authority to supervise the activities of the State Water Board. The Executive Director's consideration of a petition for reconsideration falls within the scope of authority delegated under Resolution 2007-0057. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the order, or take other appropriate action.

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<sup>1</sup> The Water Code directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the State Water Board adopts the decision or order that is the subject of the petition. (Wat. Code § 1122.) If the State Water Board fails to act within the 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon a petition simply because the State Water Board failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn 1; see *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal. 4<sup>th</sup> 1133, 1147-48, 1150-51; State Water Board Order WQ 98-05-UST at pp. 3-4.)

### 3.0 FACTUAL BACKGROUND

On December 17, 2008, the District filed a water right application with the Division. After the District submitted the required fee, the application was accepted for filing on December 24, 2008 and assigned application number 31741. In the application submitted, the District requested a direct diversion of 1.23 cfs from Aliso Creek from January 1 to December 31 and an annual limit of 87.8 acre-feet. The District listed irrigation of 30 acres within the District's service area as the proposed use. Prior to the Division accepting the application for filing, the District requested that the maximum annual amount be changed to 890 acre-feet. This amount was consistent with the amount analyzed in the California Environmental Quality Act (CEQA) document prepared for the project—a mitigated negative declaration (MND).

On January 6, 2009, the Division sent a letter to the District indicating that its application fee based on a proposed diversion amount of 890 acre-feet had been paid in full. On January 16, 2009, the Division noticed Application 31741. The District posted notice of its application in the manner required by Water Code section 1300 et seq. The posted notice listed a diversion amount of 890 acre-feet, a maximum rate of diversion of 1.23 cfs, and a place of use of 30 acres within the District's 5,200 acre service area. The Division received six protests.<sup>2</sup> The five protests the Division accepted were filed by the Clean Water Now! Coalition (Coalition), Citizen Watershed Monitors of Orange County, Devora Hertz, Joanne Sutch and the National Marine Fisheries Service (NMFS). All protests were based on potential impacts to Southern California steelhead. One protest was also concerned with sediment control.

On April 17, 2009, NMFS agreed to dismiss its protest conditional on the inclusion of certain terms in any permit the board issued pursuant to Application 31741. The April 17 NMFS letter states, "the District shall cease diversion of surface flows when surface discharge at the diversion point in Aliso Creek reaches 6 cubic feet per second." NMFS agreed to withdraw its protest if the board included this condition and other terms in any permit issued to the District.<sup>3</sup> On October 7, 2009, the Division dismissed the NMFS protest based on its stated intent to include the permit terms and conditions requested by NMFS.

On October 7, 2009, the Division advised the remaining four protestants that the protests would be cancelled pursuant to Water Code section 1335, subdivision (d) (2) unless, by November 7,

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<sup>2</sup> One protest was dismissed.

<sup>3</sup> The additional terms are not disputed.

2009, the protestants submitted additional documentation, not previously considered, showing the circumstances under which injury would occur to steelhead, or there would be adverse sedimentation impacts, taking into consideration the conditions listed in the permit terms agreed to by NMFS. Protestants submitted additional information, however, the Division found that substantial evidence did not support the allegations and the protests were dismissed pursuant to section 1335, subdivision (d)(2).

On November 4, 2009, the District suggested modifications to the terms proposed by NMFS and agreed to by the State Water Board. One proposed modification was to require the District to cease diversions when the stream flow fell below 6.0 cfs, however, if the flow was 6.0 cfs or greater to allow the District to divert 1.23 cfs. In effect, this term set the downstream bypass at a minimum of 4.77 cfs. The Division ultimately included this term in the permit. Permit 21256 specifies that the operating controls at the point of diversion shall be set to stop diversions if the flow in the creek is less than 6.0 cfs to ensure a bypass of 4.77 cfs.

In a January 11, 2010 contact report, the Division notified the District that after management review of the application, the Division planned to reduce the annual limit in the permit to approximately 90 acre-feet because this lesser amount appeared reasonable based on the proposed irrigation of 30 acres. According to the contact report, the District recalled that it originally requested 87.8 acre-feet, but later amended the amount. The District stated it would check with its environmental consultant to determine the amount of water it intended to utilize.

On January 18, 2010, the District sent a letter to the Division stating that its intended place of use was the District's entire 5,200-acre service area and it intended to utilize the entire 890 acre-feet. With the exception of an unidentified golf course, the District did not identify specific parcels that would be irrigated.

On March 2, 2010, the Division issued an Order approving Permit 21256. Permit 21256 authorized an annual use of 88 acre-feet of water for irrigation of 30 acres. Permit 21256 also authorized the District to divert 1.23 cfs from Aliso Creek by direct diversion so long as streamflow at the point of diversion was 6.0 cfs, and a minimum of 4.77 cfs was bypassed downstream of the diversion controls.

The Order explained that the Division reduced the District's requested amount to 88 acre-feet pursuant to California Code of Regulations, title 23, section 698. Section 698 provides that the board "shall reduce an application for an amount of water... clearly in excess of an amount reasonably necessary for the proposed use." The Division determined that 890 acre-feet of water was excessive for the 30-acre place of use the District had identified in its application. On March 15, 2010, the District submitted evidence to the Division showing that it could irrigate approximately 310 acres of land within its service area with the water appropriated from Aliso Creek. On March 26, 2010, the Division received a petition for reconsideration asserting that the board abused its discretion in reducing the water amount requested, that substantial evidence did not support the board's decision to reduce the yearly allocation, and that relevant evidence was submitted by the District to justify the higher diversion. The Division received letters in support of the reduction by the Coalition and other interested parties.

On June 22, 2010, the District submitted a letter to the Division responding to comments from the Coalition that supported the lower annual amount. The District asserts that the CEQA Initial Study and MND considered an annual diversion amount of 890 acre-feet, that NMFS did not require a minimum bypass flow of 6.0 cfs, and that the minimum bypass of 4.77 cfs agrees with the District's CEQA documentation and application.

## **4.0 DISCUSSION**

### **4.1 The District intended to divert 890 acre-feet annually when the application was accepted for filing.**

The District filed its application on December 17, 2008. The application proposed a direct diversion of 1.23 cfs from Aliso Creek and annual limit of 87.8 acre-feet. Prior to the Division's acceptance of the application on January 6, 2009, the District requested that the annual limit be amended to 890 acre-feet. The Division noted the change in the District's application. Following the change, the District submitted application fees based on an 890 acre-foot diversion. On January 16, 2009, the Division noticed the District's application with an 890 acre-foot limit.

Although initially it was unclear whether the District contemplated an annual diversion of 87.8 acre-feet or 890 acre-feet, the application was ultimately filed specifying an 890 acre-foot annual limit and was publicly noticed for that amount. The District's CEQA documentation also supported an 890 acre-foot diversion. The District describes its project in the Initial Study as the "capture and reuse [of] approximately 800,000 gallons per day of urban runoff in Aliso Creek." 800,000 gallons per day corresponds to an 890 acre-foot diversion per year.

In summary, it appears that the District intended to divert 890 acre-feet of water, and the Division reduced the amount pursuant to California Code of Regulations title 23, section 698 because the District's noticed application had not identified a place of use that would support the amount requested.

#### **4.2 When the Order and permit were issued, it was unclear how many acres the District planned to irrigate**

When the Division accepted the District's application for filing, only 30 acres were identified as the intended place of use. The Division noticed the application for the irrigation of 30 acres within the District's 5,200 acre service area.<sup>4</sup> The first indication the Division had that the District intended to use the water on more than 30 acres was in a letter the Division received on January 18, 2010. In that letter, the District stated that it intended to use the water to supplement its recycled water supply throughout its service area of 5,200 acres and provided information on its recycled water customers and current demand. The letter did not identify a specific place of use, nor did it specify how many acres of the 5,200 acre service area would be served by water appropriated under the application.<sup>5</sup>

Although the application specified a 30 acre-place of use, other information in the record should have alerted the Division to the likelihood that the District intended a larger place of use. The January 18, 2010 letter from the District states an intent to use water throughout the entire

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<sup>4</sup> Pursuant to Water Code section 1301, notices for proposed appropriations must specify the location and place of use.

<sup>5</sup> In March 2010, following the issuance of Permit 21256, which reduced the District's water amount, the District submitted photographs to the Division of proposed acreage to be served within its service area. The areas appear to be primarily street landscaping, parks, and golf courses throughout the service area. Although this may be evidence of the District's planned use for the water, it does not appear that the District submitted evidence showing its planned place(s) of use prior to permit issuance. The additional information showing approximately 310 acres of use was submitted after the Division issued the District's permit on March 2, 2010.

service area, and California Code of Regulations title 23, section 719 allows a public entity to specify its entire service area as a place of use for irrigated water. And the District's proposed diversion of 890 acre-feet per year is consistent with a place of use an order of magnitude larger than the 30 acres specified in the application. Given the uncertainty over the District's intended place of use, it is appropriate to remand the Division's Order and Permit 21256 to the Division to determine the District's intended place of use.

On July 8, 2010, the District submitted a change petition to increase its place of use to cover 330 acres within its 5,200 acre service area. Because the application was noticed on January 16, 2009 for a 30-acre place of use, prior to acting on the change petition, the Division may require the applicant to notice the change petition.

#### **4.3 The Division's Order and Permit 21256 are internally inconsistent as to the District's bypass requirement.**

In response to the District's petition for reconsideration, the Coalition has asserted that the annual diversion limit should remain at 88 acre-feet and that the State Water Board has "incorrectly evaluated, analyzed and circulated the wrong cfs values in [its] responses." The District addresses the Coalition's arguments regarding its diversion rate in a June 22, 2010 letter to the Division. In the letter, the District explains that the 4.77 cfs bypass requirement is consistent with State Water Board and NMFS findings as well as the bypass requirement recommended in its CEQA documentation.

NMFS, in its April 2009 letter conditionally dismissing its protest, agreed to a dismissal contingent on the District bypassing 6.0 cfs downstream of the point of diversion. The Board incorporated the NMFS terms in its letter to NMFS and other protestants stating that unless further evidence supporting the allegations was provided, the protests would be dismissed based on the inclusion of the NMFS requirements.

Inconsistent with the letter to protestants, Term 7 in the issued permit requires a bypass of 4.77 cfs downstream of the District's point of diversion. Term 7 states, "operating controls for the diversion pump shall be set to stop" if flow in the creek is less than 6.0 cfs to ensure that a minimum of 4.77 cfs is bypassed downstream. Based on this language, the 4.77 cfs bypass

appears dependant on the District's 1.23 cfs proposed diversion—not on the bypass amount that NMFS determined was required for steelhead habitat.

Further, it is unclear what would result if flow in the stream were 5.99 cfs or less. According to the permit term, a stream flow of 5.99 cfs would prohibit the District from diverting any water as the diversion controls would “stop.” This would result in a bypass of 5.99 cfs, which is inconsistent with the District’s assertion that all parties agreed to a 4.77 cfs bypass to protect steelhead.

Accordingly, the Order and Permit 21256 are remanded to the Division to clarify the bypass term and to consider whether setting the bypass at 4.77 cfs is consistent with the NMFS criteria for the protection of steelhead.<sup>6</sup> If the Division concludes that a bypass of less than 6.0 cfs is appropriate, the protests should be reinstated.<sup>7</sup>

## **5.0 CONCLUSION**

The Division’s Order issuing Permit 21256 is remanded to the Division to determine: 1) how much water the District can reasonably put to beneficial use; 2) the place of use for Permit 21256; and 3) the bypass amount necessary to protect steelhead in Aliso Creek.

The District submitted a change petition on July 8, 2010 to increase its requested place of use. The Division shall not reissue Permit 21256 until processing of the change petition is complete.

## **ORDER**

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<sup>6</sup> It is possible that the permit contemplates that the District will reduce its 1.23 cfs diversion if stream flows are less than 6.0 cfs, but the permit requires diversions to “stop” if flows are below 6.0 cfs so the permit as drafted is unclear.


<sup>7</sup> Because the protests were conditionally dismissed based on the assumption that the bypass would be at least 6.0 cfs, the protestants were never given the opportunity to submit evidence, or identify other evidence already in the record, that might support a conclusion that a bypass of less than 6.0 cfs would be insufficient, as contemplated under Water Code section 1335. Reinstatement of the protests would not necessarily preclude their dismissal later, if the circumstances specified in Water Code section 1335, subdivision (d) apply.



**IT IS HEREBY ORDERED** that the District's petition for reconsideration of the Division's Order issuing Permit 21256 and Permit 21256 be granted, consistent with the findings and conclusions above.

Dated:

DEC 01 2010

  
Tom Howard  
Executive Director

