

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-0014-EXEC

In the Matter of Petition for Reconsideration of
SAN JOAQUIN COUNTY
Regarding Order Canceling Application 29657

ORDER GRANTING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

On September 30, 2010, the State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division) issued an order canceling Application 29657 held by San Joaquin County (County). The order was signed by Victoria Whitney, then Deputy Director of the Division. Barbara Evoy became Deputy Director of the Division on October 1, 2010. To facilitate management review, mailing of the order was delayed until October 12, 2010.

Because the period for requesting reconsideration of an order lapses 30 days after the date of order issuance, at the request of the County's counsel, the September 30, 2010 order was rescinded and replaced by the order canceling Application dated October 19, 2010 (Order). On November 18, 2010, the County submitted a petition for reconsideration requesting the Order be rescinded and the County's request for extension of time to be approved.

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.,

¹ State Water Board Resolution 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 a petition for reconsideration of an order denying change and time extension petitions falls within the scope of the authority delegated under Resolution 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

tit. 23, § 768.)² 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).)

The County suggests several facts relied upon by the Division in canceling Application 29657 are in error and provides a basis for the application to be reinstated. Specifically, the County points to page 5 of the Order where the Division recites some comments by protestants to Application 29657, including a comment that "San Joaquin County is not entitled to area of origin protection." The County suggests that the Order "assumes and accepts the comments made by protesting parties... [and that it] is entitled to area of origin protection and therefore the Order is based on an error in law." Because it is not clear on the face of the Order whether the Division in fact concluded that the County is not entitled to area of origin protection or merely noted the comments of protestants, it is unclear whether the Division's conclusion, if any, was correct or incorrect and whether it would be an appropriate reason for canceling Application 29657.

Also somewhat related to the area of origin question, there is some dispute between the County and the Division as to the source of water for Application 29657 after the County moved its proposed point of diversion from the American River to the Freeport Regional Water Project on the Sacramento River. This disagreement appears to be an important factor in the Division's conclusions regarding the adequacy of the County's water availability analysis, specifically as to

² 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.

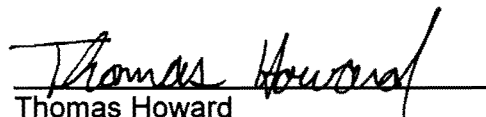
the amount of water that would have been available at the originally proposed point of diversion after taking into account prior rights and regulatory requirements. Although the County changed its point of diversion to the Sacramento River, the County has steadfastly argued that the water source for Application 29657 remains the American River. As part of the 2003 Application revisions, it was agreed that the County would prepare water availability studies necessary to ensure that diversions from the Sacramento River not exceed the amounts of water that would otherwise be obtainable by the County at the original point of diversion #3 on the South Fork American River, so as to ensure that the change would not in effect initiate a new right. The County highlights a factual dispute regarding whether the 2009 water availability analysis in fact meets this criterion. The Division should resolve this disagreement prior to either approving an extension of time for the County to pursue Application 29657 or canceling the application.

The County must also still complete the required CEQA document and respond to all outstanding protests prior to issuance of a permit on Application 29657. The County likewise must secure access to its currently proposed point of diversion. This order does not excuse the county from the requirement for diligent progress towards completion of these goals.

ORDER

IT IS ORDERED that the County's petition for reconsideration of the October 19, 2010 Order Canceling Application 29657 is granted, and this matter is remanded to the Division to determine the appropriateness of and take action on the County's most recent submitted project schedule. Such action may include approval of the most recent proposed project schedule, approval of a modified schedule, or cancellation of Application 29657 if it becomes apparent that the County will not meet the timelines in any Division-approved project schedule or does not timely provide an acceptable modified project schedule upon request.

Dated: JUN 10 2011


Thomas Howard
Executive Director

