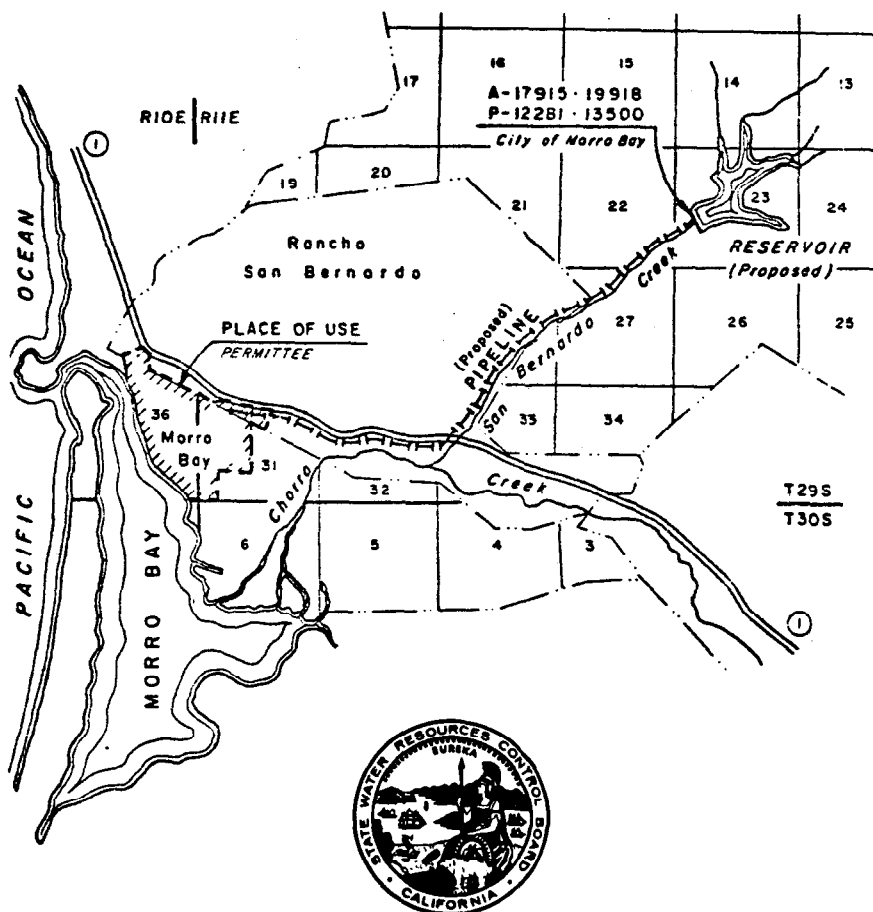


PERMIT 12281, APPLICATION 17915
PERMIT 13500, APPLICATION 19918

SAN BERNARDO CREEK

ORDER WR 87-7



AUGUST 1987

STATE WATER RESOURCES CONTROL BOARD



STATE OF CALIFORNIA

George Deukmejian, Governor

**STATE WATER RESOURCES
CONTROL BOARD**

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Edwin H. Finster, Member

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Danny Walsh, Member



James L. Easton, Executive Director

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 12281 and 13500 Issued on Applications 17915 and 19918,)	ORDER: WR 87- 7
CITY OF MORRO BAY,)	SOURCE: San Bernardo Creek
Permittee,)	COUNTY: San Luis Obispo
CALIFORNIA DEPARTMENT OF FISH AND GAME, ET AL.,)	
Protestants.)	

ORDER GRANTING EXTENSIONS OF TIME
AND DIRECTING FURTHER HEARING

BY THE BOARD:

1.0 INTRODUCTION

The City of Morro Bay having filed petitions for extensions of time on Permits 12281 and 13500; notice having been given and protests received; a public hearing having been held on August 20, 1986 by the State Water Resources Control Board; permittee and interested parties having appeared at the hearing; testimony having been received; the evidence having been duly considered; the Board finds as follows:

2.0 SUBSTANCE OF THE PERMITS

Application 17915 was filed on December 16, 1957 by San Luis Obispo County Waterworks District No. 2 (District) to appropriate 2700 acre-feet per annum (afa) by storage from San Bernardo Creek, a tributary

of Chorro Creek, from December 1 through March 31 for municipal, industrial and recreational uses. Permit 12281 was issued on May 9, 1960 on Application 17915.

Application 19918 was filed by the District on January 3, 1961, to appropriate 8414 afa by storage from San Bernardo Creek from December 1 through March 31 for municipal, industrial, recreational and fish culture purposes. Permit 13500 was issued on Application 19918 on April 18, 1962. In 1964 the City of Morro Bay (City) was incorporated and acquired title to all of the assets of the District, including all rights under Permits 12281 and 13500.

Permits 12281 and 13500 authorize the appropriation of water for a storage project with an estimated yield of 2700 acre-feet (af) and a proposed reservoir capacity of 11,114 af. The point of diversion for both permits is the proposed San Bernardo Creek Dam within the NW1/4 of SW1/4 of Section 23, T29S, R11E.¹ The place of use under the permits is the City of Morro Bay, within Sections 25, 26, 35, and 36, T29S, R10E; Section 31, T29S, R11E; Section 1, T30S, R10E; and the proposed reservoir, within Sections 14 and 23, T29S, R11E.

3.0 REQUESTED EXTENSIONS OF TIME

Permits 12281 and 13500 required complete application of water to the proposed use by December 1, 1965. This time was extended twice by the

¹ All references to Township and Range refer to Mount Diablo Base and Meridian (MDB&M).

Board, in 1963 and 1968. In 1968 the time to complete construction was extended to December 1, 1970, with application of water to beneficial use to be completed by December 1, 1975.

In November 1975 the permittee petitioned for a third extension of time. In support of the request the permittee stated that construction of the project had been delayed pending further research, analysis and evaluation of watershed yield in order to determine the most economically feasible size for the reservoir.

4.0 PROTESTS

Three protests were filed in 1977 against the latest petition for a time extension on Permit 12281. One protest was filed in 1977 on the petition for a time extension on Permit 13500. The bases of the four unresolved protests and terms of dismissal are listed in the following sections.

4.1 Roemer and Jones

Vivian Roemer and Mr. and Mrs. John W. Jones alleged that approval of the time extension would result in injury to their prior vested rights because the proposed appropriation would reduce the supply of water to downstream users. The protestants contended that the City's failure to acquire any of the land required for the dam and reservoir demonstrated a lack of diligence in completing the proposed appropriation. No dismissal terms were proposed.

Protestants did not participate in the Board's hearing on the City's petitions for a time extension in August 1986. In correspondence with

the Board, however, protestants stated that their protest could be dismissed as long as the following conditions were included in both of the City's permits:

- "1. 'Permittee shall allow the total surface inflow from April 1 to November 30 of each year to pass undiminished in quantity through the reservoir.'
- "2. 'Permittee shall release sufficient water, but not to exceed the inflow into the reservoir, during the period of December 1 to April 1 of each season to provide a surface flow in San Bernardo Creek at State Highway 1 crossing; provided, however, that the method of measuring the inflow shall be acceptable to the State Water Resources Control Board.'"

Both of the above conditions are included in Permit 12281; however, the second condition was inadvertently omitted from Permit 13500.

4.2 Domenghini Trust

The protest filed on behalf of the Domenghini Trust was based upon the same allegations as the protest filed by Roemer and Jones. The protest did not include dismissal terms, and the protestant did not participate in the hearing.

4.3 Department of Fish and Game

The Department of Fish and Game (Department) filed protests on the City's petitions for time extensions on both permits. The bases of protest and dismissal terms were the same for both protests. The Department alleged that approval of the time extension requests would have an adverse environmental impact and be contrary to the public interest. In support of these allegations, the Department contended that the permittee had made no attempt to utilize the water authorized under the permits and had, therefore, failed to exercise due

diligence. The Department also alleged that the waters of San Bernardo and Chorro Creeks support valuable fisheries and riparian wildlife habitat. The Department proposed the following dismissal terms:

- "1. 'For the protection of fish and wildlife, permittee shall maintain a minimum bypass flow of 1 c.f.s. into the natural streambed of San Bernardo Creek.'
- "2. 'Pursuant to Section 5943 of the Fish and Game Code, permittee shall accord to the public for the purpose of fishing, the right of access to the waters impounded by the dam during open season for the purpose of taking fish.'
- "3. 'Permittee shall purchase riparian habitat equivalent to that which will be inundated by said dam, and title to such land shall be deeded to be Department of Fish and Game for management purposes.'"

The Department protested the City's original application for the San Bernardo Creek storage project (Application 17915) but later withdrew the protest because the Department took the view, at that time, that utilization of the reservoir for fishing purposes should compensate for any deleterious effects on existing fisheries. The Department now contends that, due to changes that have occurred throughout the central California coast in the intervening years, fish and wildlife habitat have diminished dramatically; consequently, protection of the remaining habitat is of much greater importance than it was in the late 1950s when the City's original application was filed.

5.0 CAUSE FOR TIME EXTENSION

5.1 Legal Requirements

Water Code Sections 1396 and 1397 requires that the construction of water development projects and the utilization of water for beneficial purposes be prosecuted with due diligence, within the period specified in the permit. The Board, for good cause, however, may extend the times specified in the permit for beginning or completing construction work, for applying the water to beneficial use, or for all of these periods. Water Code § 1398. State Board regulations specify that a petition for a time extension will be granted upon such conditions as the Board determines to be in the public interest, based upon a demonstration that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if a time extension is granted. 23
Cal.Admin.Code § 844.

5.2 Due Diligence

The permittee has made no progress on construction of the project since the permits were issued in the early 1960s. The permittee has not even acquired rights-of-way for the project. The City has spent a total of \$25,000, exclusive of staff costs, for the project on preparation of a report, entitled "Reconnaissance-Level Investigation for the San Bernardo Creek Project", completed in October 1985 (Reconnaissance Report).

Although the permittee contends that it has exercised due diligence in pursuing the project, this contention is based largely upon the City's

efforts to resolve protests filed against their petitions for a time extension and water supply activities unrelated to the San Bernardo Creek project. These activities have included water resource development, water conservation efforts and water distribution system projects.

5.3 Obstacles Which Could Not Reasonably Be Avoided

The permittee cites concerns over the estimated safe yield of the project and the resulting need for time to obtain additional hydrologic data as the primary reason for not proceeding with the San Bernardo Creek project. The method originally used to estimate the project's safe yield is a synthetic method for calculating runoff estimates for areas lacking streamflow data. This method, known as the Troxell method, was used to determine the safe yield of the Whale Rock reservoir project, located on the Old Creek watershed about five miles north of Morro Bay. After the Whale Rock project was constructed, the Department of Water Resources determined that the actual yield of the reservoir was less than half of the original estimate. The Troxell method apparently results in inflated yield estimates for watersheds which experience extremes in precipitation, such as the central coastal area.

Concerns over the reliability of the yield estimates for the San Bernardo Creek project prompted San Luis Obispo County to install a gaging station on the creek just downstream of the proposed dam site in 1959. The recorder, however, was subsequently taken out of service following water year 1965 and was not reactivated until late 1977,

resulting in a loss of twelve years of critically needed streamflow data. The City has no explanation for this other than that "it just fell through the cracks".² Consequently, although the permittee justifies its lack of progress on the San Bernardo Creek project on the basis of the need for further evaluation of watershed yield, the permittee has no explanation for its failure to collect data critical to this evaluation for a twelve-year period.

5.4 Satisfactory Progress

Although the permittee has made little progress on the San Bernardo Creek project in the past, evidence in the record before the Board indicates that the City has adequate motivation to exhibit satisfactory progress in the future if a time extension is granted. The permittee's existing water supply is from the underflow of Chorro and Morro Creeks, for which applications are on file with the Board. The City contends that this supply will be inadequate within five years and is already inadequate in less than normal rainfall years. The City has analyzed alternative water sources and has concluded that the San Bernardo Creek project is the most economical alternative that can be developed within a five-year time frame.

The permittee has adopted the Reconnaissance Report for the proposed San Bernardo Creek project, which includes a schedule for completing the project. The schedule allows approximately 18 months for completion of detailed feasibility studies and an Environmental Impact

² Reporter's Transcript, August 20, 1986, State Board hearing, p. 51.

Report (EIR). In addition, the City has budgeted \$45,000 for preliminary survey and geological work, which are necessary components of the feasibility study.

5.5 Feasibility of Permitted Project

As a result of evidence introduced into the record of the hearing on the City's time extension petitions, the feasibility of the proposed San Bernardo Creek project has become an issue. The feasibility of the project has a bearing upon whether the City can implement the project with due diligence, as required by Water Code Section 1396. Specific issues relevant to a determination of project feasibility include the proposed project's safe yield, bypass flows for fisheries, and the necessity for a fish ladder.

5.5.1 Safe Yield

Using 13 years of gaged flow data on San Bernardo Creek and rainfall records, the permittee calculated the safe yield of the San Bernardo reservoir project at 1,400 afa, assuming a reservoir storage capacity of 11,200 af. The analysis, which is contained in the Reconnaissance Report, however, was based upon inflow to the reservoir accumulated on a year-round basis, and not bypassed outside the diversion season of December 1 through March 31, as required by the terms of Permits 12281 and 13500. In fact, the long-term monthly runoff estimates contained in the Reconnaissance Report indicated that about 30 to 40 percent of the annual inflow would occur outside the authorized diversion season. The Board's hearing record was, therefore, held open until September 19, 1986, in order for the permittee to submit a revised

yield analysis, based upon inflow limited to the permitted diversion season.

The City accordingly submitted a revised analysis, under which the safe yield of the 11,200 af reservoir was reduced from 1,400 afa, with a year-round diversion, to 600 afa with diversion limited to December 1 through March 31. Because of the significant reduction in estimated safe yield and the City's concerns regarding viability of the project, the City subsequently filed a new water right application to add the months of April and November to the diversion season. (See Section 6.0 of this Order, infra.)

Review of the permittee's revised analysis indicated, however, that the permittee had erroneously determined the safe yield by reducing mass inflow into the reservoir by project demand. The City, therefore, resubmitted a safe yield estimate, based upon conventional analytical techniques which indicated that the safe yield of an 11,200 af reservoir would be 2,000 afa with a diversion season of December 1 through March 31. Using the City's estimates of long-term monthly runoff and bypass flows, the Board finds that this safe yield estimate is appropriate.

5.5.2 Bypass Flows

The City's yield analysis took into account bypass flows to accommodate downstream prior rights. In addition, the analysis allowed for a 0.5 cfs bypass for a three-month period, or 90 afa, for instream fishery needs.

As discussed previously in Section 4.3 of this Order, the Department originally recommended, as a dismissal term, a minimum bypass flow of 1 cfs during the diversion season for the protection of fish and wildlife. No instream fishery studies to assess the impact of the proposed appropriation on habitat in the affected stream reach have been made; consequently, the Department's recommendation was based upon the professional judgment of staff. At the Board's hearing on the permittee's time extension petitions, Department representatives testified that a bypass of 0.5 cfs would significantly reduce available habitat and that even a bypass of 1 cfs might not adequately mitigate for the loss of the steelhead resource in the creek. In addition, a flow in excess of one cfs would be required to operate a fish ladder. The Department, therefore, recommended at the hearing that, if the City's petitions were approved, the Board condition approval on the completion by the permittee of in-depth fishery studies, using state-of-the-art methodologies.

5.5.3 Fish Ladder

The Fish and Game Code authorizes the Fish and Game Commission to mandate the construction of a fish ladder for new dams. See Art. 2, Ch. 3, Part 1, Div. 6 of the Fish and Game Code. In lieu of a fish ladder, the Commission can require the construction of a fish hatchery. Id. § 5938. The permittee indicated at the Board's hearing that the San Bernardo Creek project would be infeasible if a ladder were required; however, the City has made no attempt to pursue a waiver from the Commission.

5.6

Conclusions

Based upon the record before the Board, we conclude that the City has exercised minimal diligence in implementing Permits 12281 and 13500. The City's efforts have consisted almost entirely of funding the 1985 Reconnaissance Report and attempting to resolve protests against the petitions for a time extension. In addition, the record does not support the permittee's contention that there were obstacles to completion of the project which could not reasonably be avoided. On the other hand, the City's current water supply situation would appear to provide sufficient incentive to the City to vigorously pursue completion of the San Bernardo Creek project.

The City's updated yield analysis indicates that the project may be viable assuming that the City's estimates of long-term monthly runoff and fishery releases are correct. However, the propriety of the City's assumed fishery bypass is in question because the studies necessary to determine bypass flows for fisheries protection have not yet been conducted; and the Department contends that the City's selected fishery bypass is inadequate even in the absence of instream flow studies. If the City is allowed to extend the diversion season, it is possible that higher bypass flows could be accommodated. It is also uncertain whether the permittee will ultimately be required to construct a fish ladder.

As we explain in Section 7 of this Order, the Board cannot approve the City's time extension petitions until the City adopts an EIR for this project. The EIR will examine such issues as project feasibility and

the impacts of the project on fisheries and other resources. The Board concludes that, until the permittee completes its feasibility study and EIR, the Board has insufficient information on which to determine whether the project is feasible and whether it can be implemented with due diligence.

6.0 OFFICIAL NOTICE OF APPLICATION 28911

The Board takes official notice of Application 28911, which was accepted by the Board for filing on September 30, 1986. This new application filed by the City supplements Permits 12281 and 13500 by adding the months of April and November to the storage season. It also adds direct diversion to allow for greater flexibility in the operation of the project. Because the storage portion of Application 28911 is directly dependent on Permits 12281 and 13500, the Board will hold further processing of this application, beyond the protest period, in abeyance and will combine action on this application with further action on the subject permits.

7.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The City, as the public agency with principal responsibility for carrying out the San Bernardo Creek project, is the lead agency for the project under the provisions of the California Environmental Quality Act (CEQA), Public Resources Code Sections 21000 et seq. See 14 Cal.Admin.Code § 15381. As the lead agency, the City has indicated its intent to prepare an EIR for the project.

The State Board has an approval function with respect to the proposed project and, consequently, is in the role of a responsible agency. The Water Code requires that construction of a project and utilization of water for beneficial purposes shall be prosecuted with due diligence and that the work shall be completed and the water applied to beneficial use within the period specified in the permit. Sections 1396 and 1397. If a permittee does not comply with the time schedule contained in a permit, the Board has the discretion, for good cause shown, to extend the times for beginning construction, completing construction, applying the water to beneficial use, or any or all of these periods. Id. § 1398. The Board also has the option of revoking the permit, after notice and the opportunity for a hearing. Id. § 1410.

A Board decision to grant a permittee's request for a time extension is a discretionary decision. The Board must find good cause for granting the request and will grant the request only upon such conditions as the Board determines to be in the public interest. Id. § 1398; 23 Cal.Admin.Code § 779. A Board decision to approve a time extension request also commits the Board to a specific course of action with respect to a project, that is, it authorizes additional time for a permittee to complete a project and apply water to beneficial use and, by the same token, necessarily precludes the Board from revoking the permit during the extended time for failure to comply with the previous time schedule. Of course, the permittee's failure to comply with the new time schedule would constitute cause for revocation.

Because Board approval of the City of Morro Bay's request for a time extension constitutes an approval of the project, the Board must comply with CEQA prior to approval of the request. The Board concludes, therefore, that the City's permits should be extended only for that amount of time necessary to complete a feasibility study and an EIR.³ After completion of these reports, the Board will hold a further hearing to determine whether to grant the City additional time to construct and implement the project.⁴ At that time, the Board will also decide whether the City's permits should be modified to incorporate appropriate conditions to protect the public interest and public trust and to incorporate any appropriate mitigation measures or project alternatives identified in the EIR. In addition, the hearing will address whether or not the Board should approve Application 28911, as discussed in Section 6.0 supra.

8.0 ORDER

NOW, THEREFORE, IT IS ORDERED that the pending petitions for extensions of time for Permits 12281 and 13500 be approved in part subject to the following conditions:

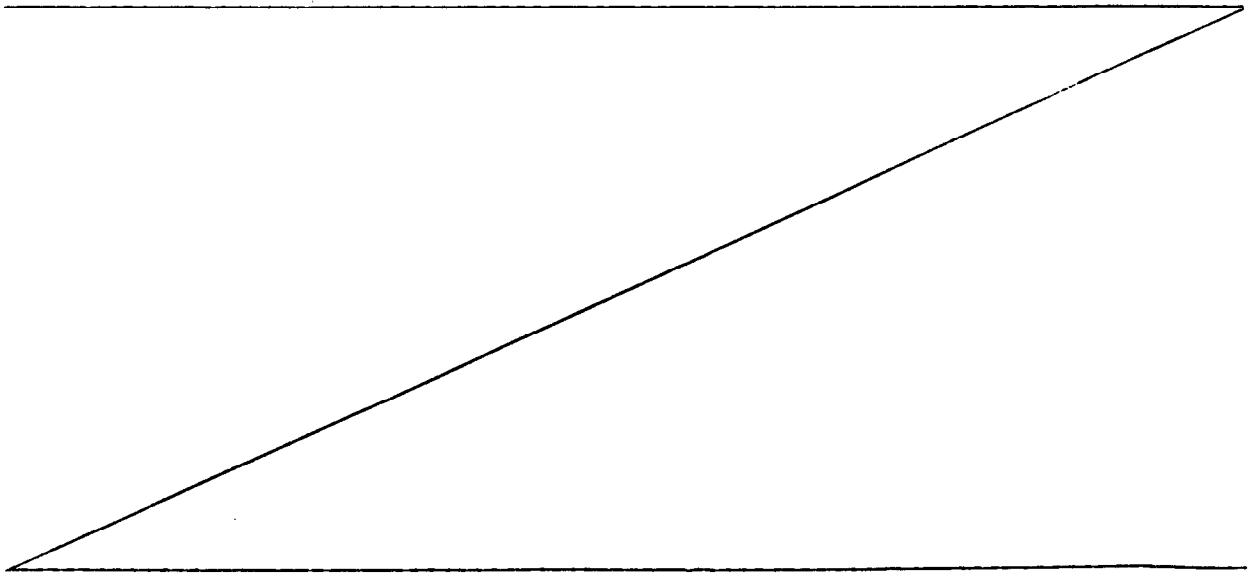
1. That the time for commencement of construction and use of water under Permits 12281 and 13500 be extended for a further Board hearing when the draft Environmental Impact Report is complete, but not later than two years following adoption of this order.

³ Projects involving only feasibility or planning studies are exempt from CEQA. 14 Cal.Admin.Code § 15262.

⁴ The Board took similar action in Order WR 75-1, Order Granting Extensions of Time, Revoking a Permit and Directing Further Hearing, for Permits 15013 through 15024 issued on Applications 11792 et al., to Calaveras County Water District.

The purpose of this hearing will be to consider the availability of water and the impacts of the project based on information developed in the Environmental Impact Report and to consider whether further time should be granted to allow for construction of the project and appropriation of water to beneficial use.

2. That the permittee be placed on notice that if additional time for project construction and appropriation of water is granted, as a result of the hearing referred to in 1. above, the permits may be amended to include conditions to protect the public interest and public trust concerns and to incorporate any appropriate mitigation measures.
3. That Application 28911 be included in the hearing referred to in 1. above and that the feasibility studies and Environmental Impact Report address the additional water rights sought by the permittee under Application 28911.



4. That an instream flow incremental methodology study be conducted on San Bernardo Creek in consultation with the Department of Fish and Game and incorporated as an element of the Environmental Impact Report.

CERTIFICATION

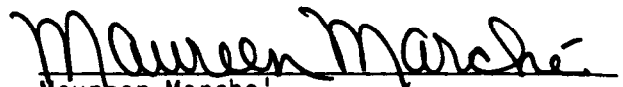
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 20, 1987.

AYE: W. Don Maughan
 Darlene E. Ruiz
 Eliseo M. Samaniego

NO: None

ABSENT: Edwin H. Finster
 Danny Walsh

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board

